LIBRARY
SUPREME COURT, U. S.

FILED
OCT 7 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 612

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,

Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HAROLD P. SPIVAK
LOUIS KANTOR
225 Broadway
New York, N.Y. 10007
Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Statutory Provisions Involved	3
Statement of the Case	4
The Petition in the State Court	5
The Rulings of the New York Courts	6
Reasons for Granting the Writ	9
Conclusion	18
	APPENDIX PAGE
APPENDIX A	
Opinion of the New York State Court, Special Term, July 19, 1966	19
APPENDIX B	
Opinion of the Appellate Division, First Department, April 6, 1967	26
APPENDIX C	
Judgment of the New York Court of Appeals, May 15, 1968	28
Opinion of the New York Court of Appeals, May 15, 1968	31

Table of Citations

Cases

	PAGE
Amalgamated Food Employees Union Local 509 v. *Logan Valley Plaza*, 88 S. Ct. 1601	14
Barmica v. *United Hatters, Cap & Millinery Workers, Local 55*, 321 F. 2d 764	15
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	2n
Construction and General Laborers Union Local No. 438 v. *Curry*, 371 U.S. 542	2n
Costaro v. *Simon*, 302 N.Y. 318	16
Garner v. *Teamsters Union*, 346 U.S. 485	8n, 17
Humphrey v. *Moore*, 375 U.S. 335	10n
International Association of Bridge Workers v. *Perko*, 373 U.S. 701	9
International Association of Machinists v. *Gonzales*, 356 U.S. 617	8, 14n
International Association of Machinists v. *Labor Board*, 311 U.S. 72	8n
McKane v. *Adams*, 123 N.Y. 609	9n
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555	2n
N.L.R.B. v. *H. K. Ferguson Co.*, 337 F. 2d 205, cert. den. 380 U.S. 912	6n
N.L.R.B. v. *Operating Engineers*, 385 F. 2d 874	6n
Oliphant v. *Locomotive Firemen, etc.*, 156 F.S. 89, affd. 262 F. 2d 359, cert. den. 355 U.S. 893	9n
Polin v. *Kaplan*, 257 N.Y. 277	9, 9n

PAGE

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 14

Ross v. *Ebert*, 275 Wisc. 523, 82 NW 2d 315 ..... 9n

Ryan v. *Simons*, 277 A.D. 100; affd. 302 N.Y. 742, cert. den. 342 U.S. 897 16

San Diego Building Traders Council v. *Garmon*, 350 U.S. 236 10

Simon v. *Berry*, 210 A.D. 70 ..... 9n

Steele v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192 .....10, 10n

Tunstall v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 ..... 11n

United Association of Journeymen Plumbers v. *Borden*, 373 U.S. 690 ..... 9, 10

Vaca v. *Sipes*, 386 U.S. 171 .....7, 9, 10, 16

Constitution and Statutes

U.S. Const. Art. 6 Cl. 2 ..... 3, 14

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 8(a)(3) 3

Section 8(b)(2) 3, 9, 10, 12, 13

Miscellaneous

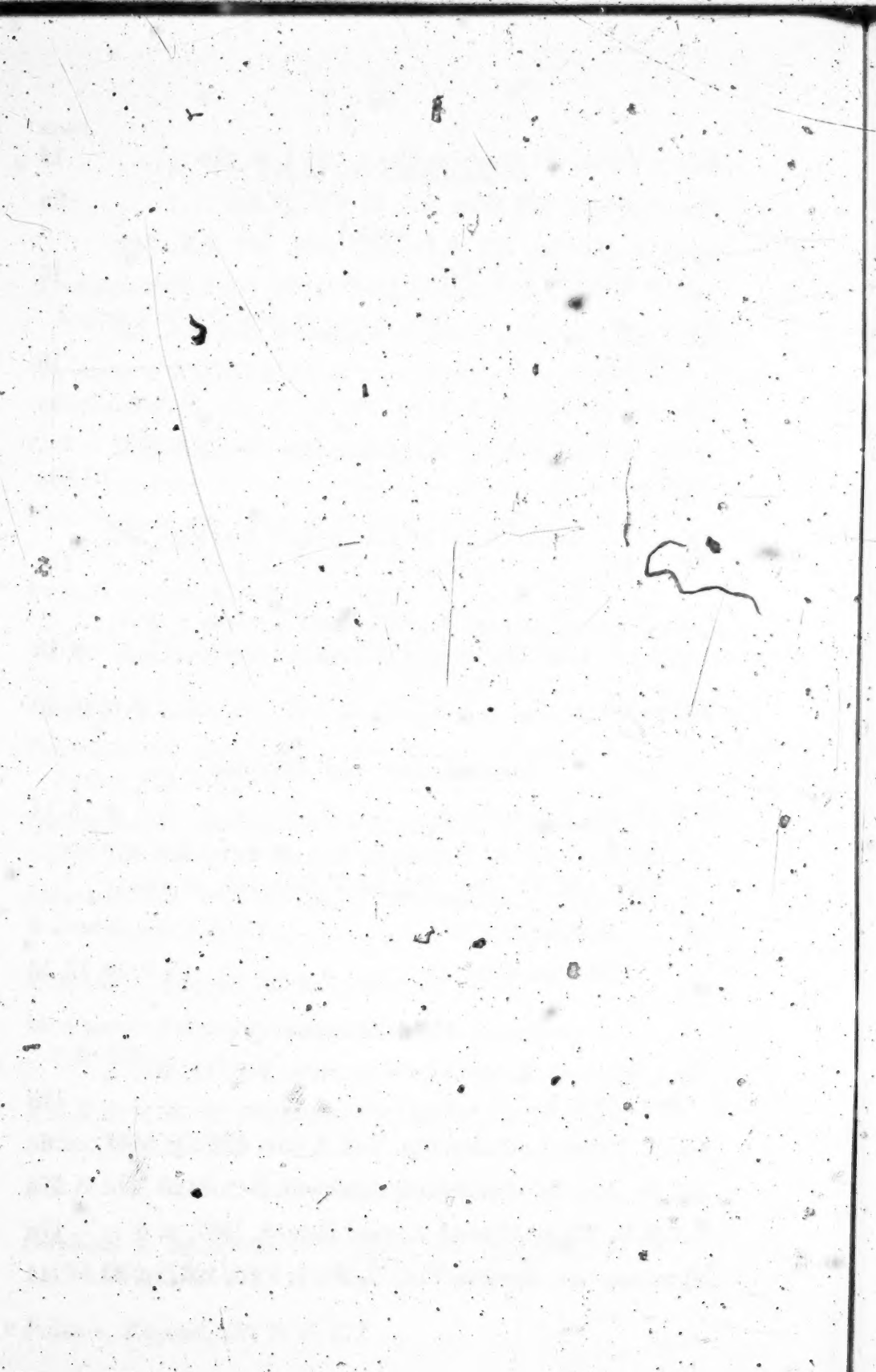
Case Western Reserve Law Review, Vol. 19, No. 1, Nov. 1967, p. 153 ..... 11n

C.C.H. Labor Law Reports, Vol. 3, par. 4520, p. 9517 6n

C.C.H. Current Comment & Analyses, Sec. 8122 .... 17n

N.L.R.B. Thirty-Second Annual Report, 1967, p. 5 .. 17n

Syracuse Law Review, Vol. 19, No. 1, Fall, 1967, p. 83 11



IN THE

Supreme Court of the United States

October Term, 1968

No.

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,

Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on May 15, 1968.

Opinions Below

The opinion of the Supreme Court of the State of New York, Bronx County, Special Term (App. A, *infra*, pp. 19-25), is reported at 51 Misc. 2d 334, 273 N.Y.S. 2d 248.

The opinion of the Appellate Division of the Supreme Court, First Judicial Department (App. B, *infra*, pp. 26-27), is reported at 27 App. Div. 2d 909, 278 N.Y.S. 2d 667.

The opinion of the Court of Appeals (App. C, *infra*, pp. 31-46), is reported at 22 N.Y. 2d 34.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1968 (App. C, p. 28). By order dated July 30, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including October 11, 1968. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Section 1257).[1]

Question Presented

In the face of a claim of federal pre-emption, does a state court have jurisdiction to enjoin a labor union and award damages against it when the crux of the charges is that the union, by reason of the non-membership of certain individuals seeking employment in the union's jurisdiction and for whom the union is alleged to be collective bargaining agent when so employed, caused them to be removed from jobs and replaced by members, made it difficult for them to obtain other employment within its jurisdiction, interfered with their employment opportunities, and required them to pay assessments on earnings as a condition of employment.

---

[1] The New York Court of Appeals' order, reversing the Appellate Division's order of dismissal, and asserting state court jurisdiction to grant injunctive relief and award damages in the face of a claim of federal pre-emption, and remanding this cause to the State Supreme Court for that purpose, constitutes a final judgment of that court which is reviewable by this Court on certiorari. *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555.

Statutes and Constitutional Provisions Involved

Article 6, Clause 2, of the Constitution of the United States, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. Section 158(a)(3) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *".

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U.S.C. Section 158(b) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for a labor organization or its agents— * * *
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. Section 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise; *Provided,* that the board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Statement of the Case

In May, 1966, relying upon and setting forth an alleged prolonged course of particularized discriminatory employment practices by petitioner (hereinafter called the "Union"), directed at them by reason of their non-membership in the Union, (membership having been denied to them) three individuals (hereinafter called "Complainants") filed a petition in a mandamus-type proceeding in the Supreme Court of the State of New York, Bronx County, praying for an order directing the Union to grant them membership therein (R. 7-11).

The Union moved at Special Term to dismiss the petition on the ground, *inter alia,* that (R. 21):

"(1) There is no authority for this proceeding;

(2) This court does not have jurisdiction to entertain this proceeding or to grant the relief sought therein".

The Court denied the motion to dismiss. (App. A, *infra* p. 25). The Union appealed to the Appellate Division, which reversed and dismissed the Petition (App. B, *infra*, p. 26). The Complainants then appealed to the Court of Appeals, which reversed the Appellate Division and remanded for further proceedings in the State Supreme Court. (App. C, *infra*, p. 38).

A. The Petition in the State Court

The petition is permeated with allegations constituting routine charges of unfair labor practices. Typical examples are as follows: Complainant Ryan alleges summary removal from his job "at the request of respondent union * * * in favor of a member of said respondent", (R. 9), and that "the sole reason for loss of employment "* * * was due to his being a non-member" of the Union (R. 10). Complainant Phalen claims he "was removed from his said part time job and replaced by " * * * a member of respondent" and that he "has been denied the equal opportunity to said part time work simply because he is a non-member" (R. 8). Complainant Amador asserts that by reason of non-membership he "has been denied opportunity to compete on an equal basis for employment with members" (R. 11); that he was "unable to obtain sufficient employment "* * * from respondent Union * * * solely because he was a non-member of respondent". (R. 10), and that by reason of the Union's discriminatory practices "he stands to lose his previously earned pension credits * * *" (R. 10).

In addition to their charges of interference with employment by reason of non-membership, the complainants claim that the Union monopolizes the jobs in its jurisdiction (R. 13) and that "a non-member must pay 4% of his gross salary to respondent Union which is used to provide burial

and other benefits for members of respondent Union" (R. 11).[2]

Referring to the petition and the complainants, the Court of Appeals says (App. C, *infra*, pp. 31, 32):

> "They are not members of the Union, and as a result of such non-membership, according to their petition, they have had difficulty in obtaining employment and have at the instance of respondents been summarily dismissed from jobs they have succeeded in obtaining and have been replaced in these jobs by union members. * * * Petitioners also complain that they were required by the union to pay 4% of their earnings to the union. These payments, they assert, went into a union fund which benefited only members of the union".

B. The Rulings in the New York Courts

1. At Special Term of the Supreme Court, the Union in its brief in support of the motion to dismiss, argued, *inter alia*, that "National Labor Relations Board Has Exclusive Jurisdiction over the Matters Set Forth in the Petition". The Complainants, in their brief, argued *inter alia*, that "the Doctrine of Pre-emption is Not Applicable". Special Term denied the Union's motion to dismiss the petition and in its opinion granting same made no reference to the pleas to the jurisdiction (App. A, *infra*, pp. 19-25).

2. The Union appealed to the Appellate Division of the Supreme Court, First Department. The issue of pre-emption was briefed by both parties, and argued. By a divided court (App. B, *infra*, p. 27), the determination appealed from was reversed and the petition dismissed upon the ground, *inter alia*, that "* * * the grievances of these petitioners are arguably within the ambit of the National

---

[2] These allegations amount to charges of unfair labor practices. *NLRB* v. *H. K. Ferguson Co.*, 337 F. 2d 205, cert. den. 380 U.S. 912; *NLRB* v. *Operating Engineers*, 385 F. 2d 874 (1967). See CCH Labor Law Reports, Vol. 3, par. 4520, p. 9517.

Labor Relations Act, as indicated by their own previous recourse to this statute, although subsequently withdrawn". (R. 43).

3. On the complainants' appeal to the Court of Appeals, that court formulated the issues before it as follows (App. C, *infra*, p. 31):

> "On this appeal we are called upon to consider two problems, first, our jurisdiction, in the face of a claim of federal pre-emption, to afford relief to working people who have been unfairly and discriminatorily treated by a labor union which is their exclusive bargaining agent with their employer, and, second, what remedies, assuming we have jurisdiction to afford any relief at all, are available to such aggrieved employees".

In rejecting the plea of federal pre-emption, the Court of Appeals relied upon *Vaca* v. *Sipes*, 386 U.S. 171, and in so doing, stated that "in line with *Vaca* v. *Sipes*, the reasoning of which we believe is applicable here, we are of the opinion that our courts have jurisdiction to entertain this action" (App. C, *infra*, p. 34). In a concurring opinion, Chief Justice Fuld stated that (App. C, *infra*, p. 44):

> "* * * I hesitate to place sole reliance * * * on *Vaca* v. *Sipes* (386 U.S. 171, *supra*), in view of the very restrictive meaning which had been given that decision by knowledgeable commentators. (See e.g., Lewis, Fair Representation in Grievance Administration: *Vaca* v. *Sipes*, 1967 The Supreme Court Review 81, 99.)".

Referring to the conduct complained of, the Court said (App. C, *infra*, p. 36):

> "The gravamen of the instant petition and of the affidavits submitted in support of it is not that petitioners are per se injured through nonmembership in respondent or that they would not be perfectly satisfied to work under the collective bargaining agreements negotiated with the various theaters by respondent, if only they could be assured of equal

opportunity for work, but that they have suffered economic injury through the illegal acts of the union in persuading employers to discriminate against them and in exacting tribute from them".

The Court of Appeals rejected the prayer of complainants for an order compelling the union to grant membership to them (App. C, *infra*, p. 36). The Court noted that the grievance complained of "might well be remedied through an action in equity in which the court could enjoin the continuance of such conduct and award incidental damages for past injuries" (App. C, *infra*, p. 36). The proceeding was accordingly remanded "to Special Term, Bronx County, with directions that an order be entered allowing petitioners to prosecute this action as if it has been commenced as a plenary action seeking whatever relief might be appropriate, including injunctive relief" (App. C, *infra*, p. 38).

Chief Justice Fuld was of the minority views that, if the facts were as alleged, complainants would be entitled to an order granting them membership under the rationale of *Gonzales* (*International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617) on the theory that since the NLRB "lacks the power to regulate admission of workers to membership, an order issued by a state court requiring a union to grant membership to a worker would not conflict with any Board remedy" (App. C, *infra*, p. 45).[3] The learned Chief Justice also equated a suit to compel admission to membership of one "wrongfully" excluded to a suit for restoration to

---

[3] It is the converse of this premise which is true (*Garner* v. *Teamsters*, 346 U.S. 485, 490), and, as held by this Court in *Garmon* (359 U.S. at 247) "* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld by the National Labor Relations Board only accentuates the danger of conflict". Moreover, as noted by this Court in *Int. Ass'n of Machinists* v. *Labor Board*, 311 U.S. 72, 82, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged".

membership of one wrongfully ousted (App. C, *infra*, p. 45).[4]

The majority of the Court of Appeals having ruled, however, that "the drastic remedy of compelling respondent to admit petitioners to membership, a measure at variance with the announced legislative policy of this State * * * seems uncalled for" (App. C, *infra*, p. 36), and having remanded the case to allow the petitioners to seek injunctive and other relief, it follows that the remedy of mandatory membership is not available and that Judge Fuld's reliance on *Gonzales* is, therefore, academic.

Reasons for Granting the Writ

1. The ruling by the New York Court of Appeals presents compelling reason for this Court to review and limit the scope and reach of *Vaca*. The assertion of state court jurisdiction over the type of union conduct complained of in this case, on the authority of *Vaca*, is an open invitation to sister states to take judicial cognizance of complaints of discriminatory employment practices by unions expressly within the prohibition of Section 8(b)(2) and which are totally unrelated to breach or administration of collective bargaining contracts or to Section 301 grievances. The decision by the New York Court of Appeals in this case presents an irreconcilable conflict with *Local 100, United Assn. of Journeymen* v. *Borden*, 373 U.S. 690, and *Local 207 Int. Assn. of Bridge Workers* v. *Perko*, 373

[4] A wrongful ouster from membership is in the nature of a breach of contract (*Polin* v. *Kaplan*, 257 N.Y. 277, 281-2) or may be statutory violation (29 U.S.C. §§ 401, *et seq.*). On the other hand, the traditional right of unincorporated associations, including labor unions, arbitrarily to exclude from membership, except under civil rights laws, is well established. *Oliphant* v. *Locomotive Firemen, etc.*, 156 Fed. Supp. 89 aff'd 262 F 2d 359, cert. den. 355 U.S. 893, 78 S. Ct. 266; *McKane* v. *Adams*, 123 N.Y. 609; *Simon* v. *Berry*, 210 App. Div. 90; *Ross* v. *Ebert*, 275 Wis. 523, 82 NW 2d 315.

U.S. 701, and if permitted to stand, will be disruptive of applicable statutory procedures and render illusory the doctrine of federal pre-emption as established by this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236.

Invoking and relying on *Vaca* v. *Sipes, supra,* the court below rejected a plea of federal pre-emption and asserted jurisdiction over the type of union conduct whose lawfulness "could initially be judged only by the federal agency vested with exclusive jurisdiction to apply federal standards". (*Plumbers Union* v. *Borden,* 373 U.S. at 698.)

The Court of Appeals overlooked the fundamental difference between the union conduct in *Vaca* and the union conduct in this case. We submit that the union conduct complained of here, totally unrelated to the negotiation, administration, violation or enforcement of a collective bargaining contract, is not within the concept, reach or definition of "unfair representation" under *Steele*[5] *or Vaca.* In effect, the Court below equates union conduct constituting classical unfair labor practices within the prohibition and definition of Section 8(b)(2). (discriminatory interference with employment by reason of non-membership), with union conduct constituting unfair representation within the meaning of *Vaca* (wrongful refusal to process a grievance). Stated otherwise, according to the Court of Appeals, every 8(b)(2) violation is, under *Vaca,* an unfair representation, thus conferring upon state Courts jurisdiction in an area

---

[5] *Steel* v. *Louisville and N.R. Co.,* 323 U.S. 192. In that case (1944) this Court accorded judicial cognizance to a complaint of unfair representation because no other forum for redress was available. "In the absence of any available administrative remedy, the right here asserted * * * is of judicial cognizance". (323 U.S. at 207.) In the instant case the complainants have available an administrative agency—the N.L.R.B.—especially created by Congress for the express purpose of providing an effective forum for the redress of precisely the type of complaint here asserted.

where heretofore exclusive jurisdiction has resided in and has been exercised by the NLRB.

The basic differences between the union's conduct in *Vaca* and the Union's alleged conduct in this case preclude the application of *Vaca* or any other case as authority for state court jurisdiction herein. In *Vaca,* plaintiff sued the union for damages, claiming that he had been wrongfully discharged by his employer in violation of the terms of an existing collective bargaining agreement and that the union wrongfully had failed to arbitrate his grievance as provided in the agreement. In the language of Mr. Justice White, 386 U.S. at page 195:

> "In this case, the employee's complaint was that the union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement".[6]

Based upon such conduct, this Court reasoned that the union had breached its duty of fair representation as evolved in *Steele,* and related cases;[7] that the breach of such duty is interrelated with breach of contract under Section 301,[8] that, historically, the NLRB had not claimed

---

[6] In a footnote, Mr. Justice White pointed out that "we are not dealing here with situations where a union has affirmatively caused the employer to commit an alleged breach of contract". (386 U.S. at p. 197.)

[7] *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210; *Humphrey* v. *Moore,* 375 U.S. 335.

[8] Commenting on *Vaca,* the *Syracuse Law Review,* Vol. 19, No. 1, Fall, 1967, p. 83 observes:

> "Without expressly denominating the suit as a section 301 action, the majority nevertheless seems to have upheld the court's jurisdiction on a basis parallel to section 301". Similarly, in *Case Western Reserve Law Review,* Vol. 19, No. 1, November 1967, p. 153, the writer states:
>
> "It appears that the Court relied on an extension of the state court's jurisdiction under Section 301 to deny administrative pre-emption in the instant case".

jurisdiction over unfair representation cases, that the application of the pre-emption doctrine was doubtful in cases where the Board's exclusive jurisdiction could not be fairly inferred; and that the courts had consistently taken cognizance of unfair representation cases subsequent to the passage of the Act, whereas the NLRB did not interpret a breach of duty of fair representation as an unfair labor practice until 1962 in *Miranda Fuel* (140 N.L.R.B. 7, enf. den. 326 F 2d 132), fifteen years after Section 8(b)(2) was enacted. It was largely upon the basis of these factors, none of which is here applicable, that this Court concluded[9] that the union's breach of duty of fair representation was within state court jurisdiction.

The conduct attacked in this case is so remote from the grievance alleged by the plaintiff in *Vaca* as to destroy any analogy between the two cases. In this case, the complaint against the Union presents no charge of violation of, or failure to enforce any collective bargaining agreement by the Union or employer nor are any terms of any agreement referred to. Rather the petition is limited to the alleged actions of the union in causing the complainants to be removed from jobs and in curtailing their efforts to procure other employment, by reason of non-membership; in denying to them opportunities of employment equal to those enjoyed by union members, and in requiring them to pay assessments on their earnings as a condition of employment without concomitant membership benefits.

The union conduct over which the state court has asserted jurisdiction is directly within the prohibition of and constitutes unfair labor practices by definition under Section 8(b)(2) of the Act. (29 U.S.C., Sections 158(b)(2)):

> "Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

---

[9] Chief Justice Warren and Justice Harlan joined in a dissenting opinion by Justice Fortas, 386 U.S. at 198.

(2) * * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *.

"Section 8(a). It shall be an unfair labor practice for employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

Congress has mandated, and this Court has reiterated, that jurisdiction to consider and act upon charges of unfair labor practices under Section 8(b)(2) resides exclusively in the National Labor Relations Board. Section 10(a), 29 U.S.C. Section 160(a), provides as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in Sec. 158 of this Title) affecting commerce. This power shall not be affected by and other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

The controlling principle governing the question of jurisdiction was formulated by this Court in *Garmon* (359 U.S. 236, 204-5):

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between the power asserted by Congress and requirements imposed by state law. . . .

"At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside

> both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. . . .
>
> ". . . When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the State as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

This rule flows from and rests upon the "Supremacy Clause" of Article 6 of the Constitution which makes federal law the "Supreme Law of the Land" and enjoins that "the Judges in every State shall be bound thereby". Comprehensive statutes enacted by Congress regulating labor relations vest the National Labor Relations Board with exclusive primary jurisdiction for the interpretation and enforcement thereof.

As stated by Mr. Justice Harlan in his dissenting opinion in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 88 S.Ct. 1618 (1968), "The reason why it was deemed necessary to fashion the doctrine of preemption under the federal laws was that it would be intolerably disruptive if this statutory scheme were interpreted differently by state and federal courts". The state courts, therefore, are precluded from enforcement of state laws on matters subject to federal statutory regulations. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

The union conduct with which we are here concerned is neither "Delphic" [10] in nature nor ". . . merely of pe-

---

[10] *Int. Assn. Machinists* v. *Gonzales*, 356 U.S. at 619.

ripheral concern of the NLRA" (*Garmon, supra*). On the contrary, the totality of the conduct over which the court below has asserted jurisdiction is "* * * plainly within the central aim of federal regulation". (*Garmon, supra*), and, as stated by this Court in *Borden*, is conduct "whose lawfulness could initially be judged only by the federal agency vested with exclusive jurisdiction to apply federal standards". Similarly, in *Iron Workers* v. *Perko, supra*, the conduct complained of was interference with plaintiff's employment. Finding that "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations", this Court ruled that (373 U.S. at 708) "* * * it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction".

2. One of the principal reasons advanced by this Court in withholding the application of the pre-emption doctrine in *Vaca* was that "it has never been rigidly applied to cases where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB" (386 U.S. at 179). The converse is equally true i.e., that pre-emption will be rigidly applied in cases where it can be fairly inferred that Congress did intend exclusive jurisdiction to reside in the NLRB. The instant case involves conduct which not only is within the express prohibition of Section 8(b)(2), but which is of the kind over which the NLRB always has exercised exclusive jurisdiction. This postulate is exemplified in *Barunica* v. *United Hatters, Cap and Millinery Workers, Local 55*, 321 F. 2d 764 (C.A.-8; 1963), wherein plaintiff alleged that the union "has refused to refer plaintiff out on employment * * * has restrained and discriminated against her in seeking employment * * *; that employment in her trade has been available but the union by its actions has deprived her of earning a

living".[11] In dismissing the complaint, the Court said (321 F. 2d at 766):

> "• • • the complaint here alleges no more than that the defendant union has refused to send the plaintiff out on any employment and has discriminated against her in seeking employment and has thus deprived her of earning a living. This amounts, however, only to a routine allegation of an unfair labor practice and a violation of Section 8(b)(2). It presents a controversy clearly within the jurisdiction of the Labor Board. And it is the kind of controversy with respect to which it has been historically held that the Board has exclusive jurisdiction to afford primary relief".

3. Another significant factor underlying this Court's rejection of pre-emption in *Vaca* was that the doctrine of unfair representation " • • • remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A." (386 U.S. at 181). In other words, this Court declined to sanction NLRB exclusive jurisdiction in respect to a matter over which the courts had exercised undisputed jurisdiction for years after adoption of the L.M.R.A. of 1947. It cannot be argued in the instant case that, subsequent to 1947, the courts, without challenge, asserted jurisdiction over activities specifically proscribed by the Act, namely, discriminatory employment practices by a labor union because of nonmembership. Attempts by the courts to exercise jurisdiction in such cases routinely are contested and the exclusive jurisdiction of the NLRB in such situations consistently upheld. (*Borden* and *Perko, supra.*) The New York Court of Appeals has heretofore expressly recognized and applied federal pre-emption to cases of this kind. (*Costaro* v. *Simons*, 302 N.Y. 318 (1951); *Ryan* v. *Simons*, 277 A.D. 100, aff'd. 302 N.Y. 742 (1951), cert. den., 342 U.S. 897.

---

[11] The charges in the instant proceeding include and go beyond those in the cited case, *i.e.*, discriminatory *removal* from jobs and unlawful exactions of assessments.

4. The far-reaching import of the ruling by the New York Court of Appeals with respect to union conduct within the express prohibition of Section 8(b)(2) cannot be overstated. To permit state courts to exercise jurisdiction over complaints of this nature will not only disrupt, but will render innocuous the established federal regulatory system. Section 8(b)(2) charges constitute a substantial part of the Board's caseload[12] and the inevitable effect of sanctioning the ruling under consideration will be to inundate the courts with such cases, and diverse procedures and remedies necessarily will supplant those fashioned for and by the Board. Congressional intent for central administration and uniform standards will be thwarted and the precept of *Garmon* consigned to oblivion.

This is precisely the situation decried by this Court in *Garner* v. *Teamsters*, 346, U.S. 490, 491:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specified and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final adminstrative order. Congress evidently considered that centralized administration of specially designed procedures were necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies * * *. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal

[12] Thirty-second Annual Report, N.L.R.B. 1967; C.C.H. Current Comment and Analysis, Sec. 8122.

Board, precludes state courts from doing so * * *. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action".

CONCLUSION

For the reasons stated, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

HAROLD P. SPIVAK
LOUIS KANTOR
225 Broadway
New York, N.Y. 10007
Attorneys for Petitioner

APPENDIX A

Opinion by Mr. Justice Jacob Markowitz

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY

HAROLD PHALEN, et al.,

Petitioners,

against

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, AFL-CIO,

Respondent.

JACOB MARKOWITZ, *Justice*:

Petitioners in this article 78 proceeding seek to compel respondent, a labor organization, to admit the petitioners to its membership.

Respondent is the sole collective bargaining agent for stagehands and stage maintenance workers employed in the counties of Bronx and New York. Petitioners have been employed as stagehands and stage maintenance workers for a period of many years. Since the union operates under a "closed shop" arrangement with the employers, petitioners are required to pay 4 per cent of their gross earnings as an assessment for the privilege of pursuing this employment. From time to time their employment is terminated or curtailed in favor of a member of the respondent union.

In addition, because of their regular albeit constantly interrupted employment in the industry, petitioners are beneficiaries of the union pension fund. However, if a member of said fund fails to earn at least $4,000 from

contributing employers in each calendar year, his eligibility ceases. It appears that this is what happened to these petitioners in 1965.

Petitioners have applied for admission to the union, but their applications have been rejected due to a practice of favoritism because of family affiliation, whereby membership is open only to sons or close relatives. Because of age restrictions, they are ineligible for the apprenticeship program of the union, which is the only other avenue to membership.

It appears to be the law of this state that absent special legislation to the contrary (see Civil Rights Law, § 43) a labor union, like a voluntary association, has complete freedom of choice in regard to its membership and may reject applications for membership for any reason it deems sufficient without any interference by the courts (Simons v. Berry, 210 App. Div. 90). This appears to be so even though the exclusion from the union may prevent an individual from obtaining employment because of a "closed shop" contract between the union and employers (Ryan v. Simons, 277 App. Div. 1,000, aff'd 302 N. Y. 742, cert. den. 342 U. S. 897; Miller v. Ruehl, 166 Misc 479).

The rationale behind this rule was stated in Frank v. National Alliance of Bill Posters (89 N. J. L. 380) as follows:

"It would be quite impracticable for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable whether for good or bad reason. Property rights the court can deal with; rights in an incorporated company are of that character and the right of membership is ordinarily assignable. Voluntary associations are quite different. The courts can deal with property rights of such associations, if there are any, while they cannot, by a mandatory writ, intrude one

man's companionship on another. To attempt to do so would be unavailing, as it would lead to the disintegration of the association'' (see Miller v. Ruehl, supra, for a statement to a similar effect).

While the general proposition that a union, like any other voluntary association, is free in the absence of special legislation to the contrary, to choose its members and to reject applications without judicial interference, has almost universal acceptance, many jurisdictions have refused to extend its application, even in the absence of a statute, to situations where a labor union holds a monopoly in the supply of labor in the locality, or attempts to maintain both a closed shop and an arbitrarily closed union. Thus, in Wilson v. The Newspaper and Mail Deliverers' Union (123 N. J. Eq. 347), the complainant was denied membership in a union which had entered into a closed shop arrangement with substantially all the employers in the industry, including the employer for whom the complainant had been working prior to the negotiations with the union. The sole ground assigned by the union for denying membership was that its books were closed by reason of the fact that many members in good standing were unemployed. The court granted the relief sought, stating: ''The question presented in the instant case is not one of prices or of serving the public but one of employment, the right of a man to sell his own labor. However, the principle is the same; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty. *Everyone must be left free to pursue his lawful calling; that is fundamental. It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade of magazine mailers. Otherwise, such persons are, by the act of the union, deprived of the right to a live-*

*lihood * * * A union may restrict its membership at pleasure; it may under certain conditions lawfully contract with the employers that all work shall be given to its members. But it cannot do both.''* (Emphasis supplied.)

(See also James v. Marinship Corporation, 25 Cal. 2d 721.)

The Restatement of Torts, while recognizing that "[r]estriction of employment * * * to workers who are members of a labor union * * * is proper object of concerted action by * * * employees" (sec. 788), carefully indicates that when "a demand for restriction does not involve either securing of work for union employees or the maintenance or increase of union membership * * * but is directed toward the establishment of a monopoly privilege in a group of present members of the union to the exclusion of everyone else" it is not within the rule enunciated (sec. 788c). Some states have adopted statutes designed to combat unreasonable refusal by unions to admit certain persons into membership (Wisconsin Employment Peace Act, Law of 1939, Chapter 57, and Pennsylvania State Labor Relations Act, Laws of 1937, No. 294, as amended.

In the matter at bar, not only has respondent engaged in arbitrary admission and monopolistic practices, but it had added to the odium of its acts by further courses of conduct which compel rectification by the courts. For years, it has exacted tribute from petitioners, in the form of a four per cent assessment, just for the privilege of being allowed to work, often at lower pay scales, without the concomitant benefits. protection, or security afforded to its members. In addition, its arbitrary refusal to admit petitioners into membership, has either effectuated or threatens to effectuate, a divestment of their pension fund benefits. It has been held by this court that:

"[c]ontributions made to a welfare fund, as well as the reserve accumulated therefrom, actually constitute a por-

tion of the compensation of the employees on whose behalf they are made. * * * Because such funds are trust funds, however, the participating employees have only an equitable interest in the reserve, as beneficiaries of the trust, and have no right to have any part of the reserve paid over to them directly. Nevertheless, that equitable interest is a substantial one * * * *" (Nicoletti v. Essenfeld, 171 N. Y. S. 2d 373). In the instant matter, respondents arbitrary resrictions, in effect, have or threaten to cause petitioners to lose valuable equitable rights. This is tantamount to an unconstitutional usurpation of property which cannot be condoned.

In so far as respondent's practice of filial preference is concerned, it was stated by this court in State Commission of Human Rights v. Farrell (43 Misc. 2d 958, 965):

"The court recognizes that the practice of giving some preference to applicants with filial ties to members is widespread and dates back to the very inception of craft unions when craftsmen first joined together in guilds. The historic, economic and social reasons for the practice of filial preference and its beneficial effects have been urged by the union and examined by the court."

However, "under the reality of today's society" and constitutional and legislative guarantees, it was concluded that such practice was illegal, the court adding:

"In addition to the overriding constitutional and legislative declarations of equality, the court believes that filial preference is contrary to modern day societal objectives concerning job qualifications. No lawyer or doctor today would expect his son to receive preference by reason of family relationship in applying for admission to the Bar or a medical license. Admission to a profession or industry based exclusively upon the applicant's qualifications to perform * * * as determined by objective criteria is to be encouraged" (p. 966).

Appendix A
Opinion by Mr. Justice Jacob Markowitz

The court is aware of the previous reluctance of the courts of this state to interfere with the internal policies of unions. It is further aware that in a previous decision it questioned the propriety of using the device of mandamus against unincorporated labor associations, stating:

"In view of the clearly articulated purposes and limitations of article 78, such considerations as the petitioners put forward can only be considered to be the province of the Legislature rather than the judiciary" (Mangano v. Altmeyer, 225 N. Y. S. 2d 379).

However, it was also pointed out in that case that:

"There is considerable merit to the contention that numerous so-called private bodies in our society exercise a truly public function and are vested with a strong public interest. Among other facts of their operation, the number of people whose rights are affected by the action of such bodies and the official sanction which is given to their operation whether directly in the form of statutory association or indirectly in the form of tax privileges, require their designation as private bodies to be regarded with some reservation."

Modern attitudes require modern approaches. As one court aptly put it:

"If the characterization of a labor union as a voluntary association becomes in time a mere anachronism, the mere word 'voluntary' will not likely preserve the present state of the law. Again it is wise to foresee that a change in surrounding circumstances—such as the economic strengths of competing groups—may make the existing law disjointed and an instrument of oppression if strictly adhered to.

It is the peculiar genius and strength of the common law that no decision is stare decisis when it has lost its usefulness in our social evolution; it is distinguished, and

if times have sufficiently changed, overruled. Judicial opinions do not always preserve the social statics of another generation." (Carroll v. Local No. 269, International Brotherhood of Electrical Workers, 133 N. J. Eq. 144).

And as Professor Teller stated:

"Labor unions which close their ranks to the public thereby assume a sovereignty which is not theirs to assume * * * the closed shop as an instrumentality of a labor union, membership wherein is reasonably open to the public, establishes a desirable rule governing industrial enterprise. The closed shop at the hands of a labor union which substantially excludes the public from its benefits on the other hand is a means whereby an anti-social monopoly is foisted upon the industrial body politic." (Teller, Labor Disputes and Collective Bargaining, vol. 1, page 285)

It is the conclusion of this court that just as the business community must give way to the public policy of the state with respect to monopolistic practices, just as government is enjoined from committing unreasonable or capricious acts, so, too, must labor unions, as quasi public organizations, accept that level of maturity and responsibility which compels them, in the public interest, to refrain from arbitrary and unfair actions.

In the matter at bar, not only is it apparent that the respondent by its arbitrary membership policies has distorted the legal and beneficial purposes of the closed shop devise of industrial government to effectuate generally anti-social results, but more specifically, it has used this practice to extort assessments from petitioners without corresponding benefits, and to divest petitioners of a valuable property right.

For the foregoing reasons, petitioners' motion is granted as prayed for, and respondent's cross-motion to dismiss is denied. Settle order.

APPENDIX B

APPELLATE DIVISION OF THE SUPREME COURT

First Department

Harold Phalen, et al.,

Respondents,

against

Theatrical Protective Union No. 1, International Alliance of Theatrical and Stage Employees, AFL-CIO,

Appellant.

Before:

Steuer, *J. P.*, and Tilzer, Rabin, McNally and McGivern, *JJ.*

Per Curiam.

[1-3] Order entered on September 7, 1966 denying cross-motion of respondent-appellant reversed on the law, and cross-motion to dismiss petition granted, without costs or disbursements. In the absence of a violation of a statutory duty, an Article 78 proceeding for mandamus does not lie. This is the present state of the law in this state, according to an unbroken line of precedents. The learned court below indicated its awareness of this, but opined that because of socio-economic changes vis-a-vis unions, there should be a change. That may very well be, and the cause, indeed, may be just, but achieving such a change by judicial fiat is beyond the competence of this court. Redress should

come from the legislature. See, C.P.L.R. 7803, subdd. 1; Matter of Weidenfeld v. Keppler, 84 App. Div. 235, 82 N.Y.S. 634, aff'd 176 N.Y. 562, 68 N.E. 1125; People ex rel. Solomon v. Brotherhood of Painters, 218 N.Y. 115, 121, 112 N.E. 752, 754; Simons v. Berry, 210 App. Div. 90, 93, 205 N.Y.S. 442, 444; Oliphant v. Brotherhood of Locomotive Firemen & Engineers, D.C., 156 F. Supp. 89, aff'd 6 Cir., 262 F. 2d 359, cert. denied 359 U.S. 935, 79 S. Ct. 648, 3 L.Ed. 2d 636.

Further, the grievance of these petitioners are arguably within the ambit of the National Labor Relations Act, as indicated by their own previous recourse to this statute, although subsequently withdrawn. However, there is no purpose in pursuing this point, as the main reasons (supra) for rejecting the order are rudimentary.

All concur except Steuer and Benjamin J. Rabin, *JJ.*, who dissent and vote to affirm.

APPENDIX C

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of May in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD, Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur May 15, 1968.

In the Matter of

HAROLD PHALEN & ORS.,

Appellants,

vs.

THEATRICAL PROTECTIVE UNION No. 1, & c.,

Respondent.

BE IT REMEMBERED, That on the 13th day of November in the year of our Lord one thousand nine hundred and sixty-seven, Harold Phalen, & ors., the appellants in this cause, came hereunto the Court of Appeals, by Solomon D. Monshine, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Theatrical Protective

Union No. 1, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Spivak & Kantor, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Maurice Rosenberg, of counsel for the appellants, and by Mr. Louis Kantor, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 15, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

[SEAL]

Appendix C

STATE OF NEW YORK

Court of Appeals

Harold Phalen, et al.,

Appellants,

against

Theatrical Protective Union No. 1, International Alliance of Theatrical and Stage Employees, AFL-CIO,

Respondent.

Burke, *Judge.*

On this appeal we are called upon to consider two problems, first, our jurisdiction, in the face of a claim of Federal pre-emption, to afford relief to working people who have been unfairly and discriminatorily treated by a labor union which is their exclusive bargaining agent with their employer, and, second, what remedies, assuming we have jurisdiction to afford any relief at all, are available to such aggrieved employees.

Petitioners-appellants in this article 78 proceeding, seeking an order in the nature of mandamus directing respondent Theatrical Protective Union No. 1, the sole bargaining agent for stage hands and stage maintenance men in New York and Bronx Counties, to admit them to membership in respondent, have brought charges against this union which, if true, would be violative of law. Petitioners allege in their petition that for many years past each of them has been employed either as a stage hand or stage maintenance man at theatres within this union's jurisdiction. They are not members of the union, and as a result of such

nonmembership, according to their petition, they have had difficulty in obtaining employment and have at the instance of respondent been summarily dismissed from jobs they have succeeded in obtaining and have been replaced in these jobs by union members. Petitioners Phalen and Amador claim further that, as a result of the union's actions in having them discharged and replaced by union members, their earnings for 1965 from employers contributing to the pension fund maintained by the union fell below $4,000, the amount required to maintain eligibility in the pension plan. Petitioners also complain that they were required by the union to pay 4% of their earnings to the union. These payments, they assert, went into a union fund which benefited only members of the union. Petitioners claim to have made repeated applications for membership in the respondent union, all to no avail. In his supporting affidavit petitioner Phalen charges that union membership may be obtained only through being proposed by a member of the union and that petitioners are unable to obtain such sponsorship, as this is "generally exercised in favor of sons or relatives [of members]."

At Special Term of the Supreme Court, Bronx County, the petitioners, relying on their petition and supporting affidavits, moved for an order directing respondent to admit them to membership, and the union cross-moved to dismiss their petition, on the grounds that (1) there was no authority for such a proceeding, (2) the court was without jurisdiction to entertain it, (3) the petition did not state facts sufficient to entitle petitioners to the relief sought, and (4) the proceeding was untimely under CPLR 217 (which latter contention is not pressed on this appeal). Special Term denied the cross-motion of respondent and, despite its recognition that its action was unprecedented in this State, granted petitioners' motion unless the respondent should serve and file an answer to the petition within 10

days. No answer was filed and an order directing respondent to admit petitioners to membership was entered against respondent.

On appeal to the Appellate Division, First Department, that court, with two Justices dissenting on the opinion of Special Term, reversed and granted respondent's cross motion to dismiss the petition, on the ground that "according to an unbroken line of precedents * * * in this State" "[i]n the absence of a violation of a statutory duty, an article 78 proceeding for mandamus does not lie." As a further ground of decision the court also pointed out that petitioners' grievances were "arguably within the ambit of the National Labor Relations Act," indicating, apparently, the court's view that under the doctrine of Federal pre-emption as enunciated in San Diego Bldg. Trades Unions v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775, this controversy was within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

We are in agreement with the majority below that mandamus will not lie under the circumstances of this case, but we are also of the opinion that our courts are not ousted of jurisdiction over the present controversy under the Federal pre-emption doctrine and that, while petitioners were not entitled to bring their action in the form in which it was brought or to the relief requested, they did on their pleadings and proof, if unanswered, make out a case for injunctive relief of a lesser order and, therefore, their petition should not have been dismissed, but, rather, an order should have been entered allowing them to proceed with their action in the form of an ordinary action in equity.

I

[1] Turning first to the argument that, because petitioners' grievances are "arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" (see San

Diego Unions v. Garmon, supra, 359 U.S. p. 245, 79 S.Ct. p. 780), we are of the opinion that under the recent decisions of the United States Supreme Court in Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903, 17 L.Ed. 842 and Mangus v. A. C. E. Freight, Inc., 386 U.S. 482, decided in a brief *Per Curiam* opinion under the authority of Vaca v. Sipes but reported below at 6 Ohio App.2d 87 [Ct. of App. of Ohio], considerably limiting *Garmon's* seemingly absolute ban on courts' exercising jurisdiction over controversies "arguably subject to § 7 or § 8 of the Act" (see, especially, Mr. Justice WHITE's opinion for the court in Vaca v. Sipes, supra, 386 U.S. p. 179, 87 S.Ct. 903, and Mr. Justice FORTAS' concurring opn. p. 199, 87 S.Ct. p. 911), our courts may exercise jurisdiction over the instant controversy.

As we read this petition it charges the respondent labor union with violation of its Federal statutory obligation under the National Labor Relations Act "to serve the interests of all members [of bargaining units for which it is exclusive bargaining agent] without hostility or discrimination toward any" (Vaca v. Sipes, supra, 386 U.S. p. 177, 87 S.Ct. p. 910). In a series of decisions going back over many years the United States Supreme Court has recognized this duty of unions and the right of employees to obtain enforcement of the union's obligation of fair representation in the courts (see authorities cited in Vaca v. Sipes, supra, 386 U.S. p. 177, 87 S.Ct. p. 909), and in Vaca v. Sipes we are told that, just because the NLRB belatedly recognized that unfair representation could be interpreted as an unfair labor practice in violation of section 8 (subd. [b]) of the act (see Miranda Fuel Co., 140 N.L.R.B. 181 [1962]), the courts are not ousted of their jurisdiction in this field. In line with Vaca v. Sipes, the reasoning of which we believe is applicable here, we are of the opinion that our courts have jurisdiction to entertain this action.

Appendix C

II

[2-4] A finding that our courts may exercise jurisdiction over the instant controversy does not, of course, mean that petitioners were entitled to the relief requested or to prosecute their action in the form in which it was brought. The relief sought here is, as both courts below have recognized, unprecedented in this State, and, while we would be prepared, despite this, upon proper pleadings and proof to uphold an order compelling a labor union to accept into membership members of a bargaining unit represented exclusively by that union, where such relief was the only means by which unfairly represented employees could be assured of nondiscriminatory representation, petitioners have not made such a showing. In addition, we are also of the opinion that, even if petitioners were entitled to an order directing the respondent to admit them to membership, the extraordinary remedy of mandamus is not the proper means by which such relief should be sought, and, on this latter point, we would only note that unincorporated labor unions are not the sort of bodies against whom mandamus traditionally lies (see People ex rel. Solomon v. Brotherhood of Painters, 218 N.Y. 115, 112 N.E. 752, see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7802.01) and, as the very same relief could be obtained in an ordinary action in equity for a mandatory injunction directing respondent to admit petitioners to membership* there is no

* While the instant controversy would appear to come within the literal terms of the very broad definition of "labor dispute" found in subdivision 10 of section 807 of our Labor Law and, therefore, to be subject to section 807's limitations upon our courts' issuing injunctions in such disputes, the long standing construction placed upon section 807 is that it has no applicability where the subject of the activity sought to be enjoined is unlawful (see, e.g., American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 231, 36 N.E.2d 123, 125; Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 305, 101 N.E.2d 697, 801, 32 A.L.R.2d 1019; Incres S. S. Co. v. International Mar. Workers Union 10 N.Y.2d 218, 219 N.Y.S.2d 21, 176 N.E.2d 719, dissenting opin., 10 N.Y.2d p. 231, 219 N.Y.S.2d p. 30, 176 N.E. p. 725), and this is certainly the nature of the union activities here alleged.

need to consider broadening the traditional scope of the writ of mandamus to include this type of situation (cf. People ex rel. Solomon v. Brotherhood of Painters, supra, 218 N.Y. p. 122, 112 N.E. 752; see, also, Matter of Coombs v. Edwards, 280 N.Y. 361, 364, 21 N.E. 2d 353, 354.

[5] The gravamen of the instant petition and of the affidavits submitted in support of it is not that petitioners are per se injured through nonmembership in respondent or that they would not be perfectly satisfied to work under the collective bargaining agreements negotiated with the various theatres by respondent, if only they could be assured of equal opportunity for work, but that they have suffered economic injury through the illegal acts of the union in persuading employers to discriminate against them and in exacting tribute from them. These are unquestionably serious grievances but, as far as appears from this record, they might well be remedied through an action in equity in which the court could enjoin the continuance of such conduct and award incidental damages for past injuries. Under these circumstances the drastic remedy of compelling respondent to admit petitioners to membership, a measure at variance with the announced legislative policy of this State, which provides, with only limited exceptions (see Civil Rights Law, Consol.Laws, c. 6, § 43; see, also, Gaynor v. Rockefeller, 15 N.Y.2d 120, 132-133, 256 N.Y.S.2d 584, 592-593, 204 N.E.2d 627, 632-633), that labor organizations should enjoy "full freedom of association" (see Labor Law, Consol. Laws, c. 31, § 700), seems uncalled for. It may, of course, develop that a court could properly find that a particular labor organization had, through a course of conduct evidencing flagrant and persistent disregard for the rights and interests of nonmembers represented by it, forfeited any legitimate claim to the right to continue to restrict its membership. But no such showing has been made here, and without such a showing we are unprepared, in the absence of legislation on the

order of Section 43 of our Civil Rights Law, which bars denial of membership in labor organizations on grounds of race, creed, color or national origin, to hold that labor organizations must open their membership to persons whom they would rather not admit to their company.

III

[6] Our determination that petitioners have prosecuted their action in an improper form and requested relief to which they are not entitled does not, however, serve to put them out of court. The improper form in which their action has been brought and their failure to request the appropriate relief is not a bar to their receiving whatever relief they may be entitled to. CPLR 103 (subd. [c]) provides that once a court has obtained jurisdiction over the parties in a "civil judicial proceeding" the proceeding "shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution", and CPLR 105 (subd. [d], which defines "civil judicial proceeding", is clearly broad enough to include the instant proceeding, defining a "civil judicial proceeding" as a "prosecution, other than a criminal action, of an independent application to a court for relief." Similarly, CPLR 3017 (subd. [a]) provides, in part, that a court "may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded". Accordingly, the order appealed from should be reversed and the case remanded to Special Term so that an order may be entered allowing its proper prosecution.

Upon the proceedings had following remand we believe it would be best if the parties would develop the fullest possible record, and this would undoubtedly be aided if petitioners were to plead over or otherwise expand upon the allegations contained in the present petition and supporting affidavits. A fully developed record will be of in-

estimable value to Special Term in moulding whatever remedy or remedies it should deem necessary and to any reviewing court, should there be occasion for another appeal. Special Term is fully competent to devise an adequate and proportionate remedy for petitioners should their charges of discrimination be sustained (cf. State Comm. for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S. 2d 649) and for this reason we refrain from suggesting at this point what specific remedies ought to be afforded petitioners, preferring instead to leave these matters for determination in the first instance to Special Term.

The order appealed from should be reversed and the case remanded to Special Term, Bronx County, with directions that an order be entered allowing petitioners to prosecute this action as if it had been commenced as a plenary action seeking whatever relief might be appropriate, including injunctive relief.

FULD, Chief Judge (concurring).

I agree with Judge Burke for reversal but I cannot accept the assumption—which seems, in part, to underly his reasoning—that labor organizations "enjoy 'full freedom of association'" and are under no duty to open their membership "to persons whom they would rather not admit to their company", except in certain extraordinary, but undefined, circumstances (opinion, 22 N.Y. 2d p. 41, 290 N.Y.S. 2d p. 886, 238 N.E. 2d p. 299). Nor am I able to subscribe to the suggestion (opinion, pp. 39-40, 290 N.Y.S. 2d 885, 238 N.E. 2d 298) that an aggrieved individual will have adequate relief if, in an action against the union for breach of its duty of fair representation, the court merely enjoins continuance of discriminatory conduct in the future and awards damages stemming from past discrimination. For these reasons, I am impelled to write a separate opinion.

It is my view that, if a labor organization arbitrarily refuses to admit to membership persons, otherwise fully

qualified by experience and ability, they are entitled, in a case not covered by section 43 of the Civil Rights Law, to an order or injunction directing the union to admit them to membership.[1] On a motion to dismiss a pleading, be it complaint or petition, we read the allegations most favorably to the pleader (see, e.g., Kober v. Kober, 16 N.Y. 2d 191, 193-194, 264 N.Y.S. 2d 364, 365-366, 211 N.E. 2d 817, 818; Condon v. Associated Hosp. Serv., 287 N.Y. 411, 414, 40 N.E. 2d 230, and, so read, the allegations in the challenged pleading are sufficient to make out a cause of action entitling the petitioners to such an order.

National labor policy has been built on the premise that a majority labor organization is the most effective vehicle for obtaining improvements in wages, hours and working conditions. Consequently, it has been said, that policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123). The importance of the union in the economic life of the employee today cannot be overemphasized and, accordingly, its authority to act as exclusive representative is subject to the concomitant obligation to represent all members of the bargaining unit "without hostility or discrimination toward any, to exercise its discretion without complete good

---

[1] The requirements of section 807 of the Labor Law have no application to a proceeding by an employee against a labor organization to admit him to membership. Section 807—derived from section 876-a of the Civil Practice Act (the little Norris-LaGuardia Act)—is simply designed to prevent the issuance of injunctions, principally on the application of employers, in labor disputes, a term so defined in subdivision 10 (par. [c]) of the statute as to clearly exclude controversies between a union and its members or potential members. (See e.g., Wolchok v. Kovenetsky, 274 App. Div. 282, 284, 83 N.Y.S.2d 431; Caliendo v. McFarland, 13 Misc.2d 183, 175 N.Y.S.2d 869.)

faith and honesty, and to avoid arbitrary conduct." (Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842; Humphrey v. Moore, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370.) A union which breaches its statutory mandate to represent all employees fairly and without discrimination is subject to an action for damages and an injunction to prohibit the continuance of the discriminatory conduct. (See Steele v. L. & N. R. Co., 323 U.S. 192, 207, 65 S.Ct.226, 89L.Ed. 173; Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Syres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785.)

The Supreme Court in the *Steele* case (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), declared that the Railway Labor Act imposed on the union, a duty, "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith" (323 U.S., at p. 204, 65 S.Ct. at p. 233).[2] And, in ensuing years, the courts have applied the doctrine to cases involving racial, see, e.g., Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283), as well as nonracial (see, e.g., Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra; Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370, supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048), discrimination.

---

[2] On the same day on which it decided *Steele* (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), the Supreme Court also interpreted the National Labor Relations Act to require fair representation, saying that a union, as the agent of all the employees, was "charged with the responsibility of representing their interests fairly and impartially." (Wallace Corp. v. Labor Bd., 323 U.S. 248, 255, 65 S.Ct. 238, 242, 89 L.Ed. 216; see, also, Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; Syres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 822, supra; Humhprey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370, supra.)

However, an action for breach of the duty of fair representation by one who has been discriminated against, although it may afford him an important remedy, is no substitute for democratic participation in the affairs of the union. Unless an individual is a member of the union, he can have no voice in the selection of its officers who are his representatives in the collective bargaining process. Nor can he, if a non-member of the union, express his approval or disapproval of the terms of the collective bargaining agreement, which most vitally affects every day of his working life, embodying as it does the wages and terms and conditions under which he is to work. Again, as a nonmember, an employee will have no say (within the union) as to questions pertaining to grievances arising under the collective bargaining agreement even though the interpretation and enforcement of the agreement may have a most serious impact upon him.

Furthermore, a union is free to take positions between sets of conflicting employees represented by it and is allowed a wide range of reasonableness in serving the unit it represents so long as it acts in good faith. (See Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 11 L.Ed.2d 370, supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, supra; Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra.) The line of demarcation between the reasonable exercise of discretion and arbitrary abuse of power is often shadowy, and membership in the union of all qualified workers will furnish at least minimum assurance that the statutory bargaining agent has acted in good faith and in a nonarbitrary manner. A union official might well think twice before discriminating against a worker, or a class of workers, if those discriminated against might, as members of the union, prevent his re-election.

Appendix C

Labor organizations, given the power to act as exclusive bargaining agents, are quasi-public organizations and ancient dogma, which described them as voluntary associations with unfettered control over their membership rolls, must be revised in the light of the realities of present-day industrial life. Membership in a union is, today, a matter which critically affects a person's ability to earn a living. It follows, therefore, that a labor organization may not arbitrarily exclude an employee from membership and that any discriminatory exclusion from such membership must be condemned and stricken under state law (see Note, 59 Col.L.Rev. 190, 199-200).

These views are not in conflict with what the court said in Gaynor v. Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627. We there held that the courts will not, at least in the first instance, issue an injunction mandating a labor organization to admit to membership persons excluded because of race, creed, color or national origin. But that conclusion was dictated, in large part, by the fact that in that case the plaintiffs against whom racial discrimination was being practiced were given a full and adequate remedy by resort to the State Commission for Human Rights (Civil Rights Law, § 43). In the case before us, however, no such relief is available to the petitioners and, consequently if there is to be redress, it must be by way of a judicial proceeding. The Legislature did not consider whether the arbitrary exclusion of an employee for any reason other than race, color, creed or national origin requires the specially flexible and sensitive procedures available to the Commission for Human Rights (Executive Law, § 297, subd. 2). But, certainly, designation of that commission to deal with racial and religious discrimination did not take from the courts the broad powers vested in them to grant to parties aggrieved by wrongful conduct such relief as the situation demands.

Appendix C

It is true that the petitioners, by applying to the National Labor Relations Board or by bringing a *Steele*-type action, could have obtained an injunction against the union, forbidding continuation of their discriminatory conduct, as well as damages suffered by them (National Labor Relations Act, §8, subd. [b], par. [2]; see, e. g., Steele v. L. & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra). But the National Labor Relations Board is powerless to order that they be admitted to membership (infra, p. 47), and an injunction which merely enjoined the union from continuing its wrongful conduct would be utterly inadequate and incomplete relief. Lawsuits and injunctions are no substitute for the processes of democracy. Nothing less than membership in the union can give the petitioners—assuming they prove their allegations—their rightful opportunity to participate, however indirectly, in the making of decisions which affect them so materially. Nor will a court injunction against discriminatory conduct enable them, in seeking jobs, truthfully to represent to prospective employers that they are members of the union having jurisdiction over the work involved—a representation which, as a practical matter, may be an indispensable prerequisite to obtaining employment.

This does not, of course, mean that a union must open its doors to felons (see Sovern, Legal Restraints on Racial Discrimination in Employment, ch. 6, p. 152, n. 43), to persons not qualified to perform the work of the bargaining unit or to persons who for any reason have undertaken to destroy the union.[3] It does mean, though, that the union

[3] In Tawas Tube Prods. (151 N.L.R.B. 46, 48), the board held that a union did not violate section 8(b) (1) (A) because of its expulsion of members who had filed a decertification petition since the proviso to section 8(b) (1) (A) "would necessarily allow a union to expel members who attack the very existence of the union as an institution."

must admit all workers to membership without discrimination and that if, in bad faith or arbitrarily, it rejects an applicant, it may be compelled by order of the court—or in the case of racial discrimination by direction of the Human Rights Commission—to admit him to membership.

On the question of Federal pre-emption, I would say but a few words. Although I agree with Judge BURKE that the present action is not federally pre-empted, I hesitate to place sole reliance, as he has, on Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra, in view of the very restricted meaning which had been given that decision by knowledgeable commentators. (See, e. g., Lewis, Fair Representation in Grievance Administration: Vaca v. Sipes, 1967 Supreme Court Review 81, 99.) My reason for concluding that there is no Federal pre-emption in this case is very simple: the National Labor Relations Board does not have the power to direct a labor union to admit a worker to membership.

Section 8(b) (1) (A), which makes it an unfair labor practice for a union to restrain or coerce employees in their right to engage or refrain from engaging in collective activities, adds the proviso "[t]hat this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". (See, e. g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184, 186, 87 S.Ct. 2001, 18 L.Ed.2d 1123, supra.) The Supreme Court, construing that proviso, held in International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018, that a state court was not precluded, by virtue of the pre-emption doctrine, from restoring to membership a union member who had been wrongfully ousted from the union and that the state had the power to award consequential damages even though those damages might be for conduct which constituted an unfair labor practice. (See, also, Local

100 of the United Assoc. of Journeymen & Apprentices Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 10 L.Ed.2d 638.) In the course of its opinion, the court declared that "to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act" (356 U.S. at p. 620, 78 S.Ct. at p. 925)[4]

Thus, it is indisputable that the National Labor Relations Board lacks the power to regulate admission of workers to union membership, and an order issued by a state court requiring a union to grant membership to a worker would not conflict with any board remedy. It is hardly necessary to add that there is no perceivable difference, in the present context, between *restoring* to membership an employee wrongfully ousted and *admitting* one who has been wrongfully excluded from such membership. The injustice suffered by the worker in either case is precisely the same.

---

[4] In 1963, five years after *Gonzales,* the court summarized its holding in that case in these words (Local 100 of the United Assoc. of Journeymen & Apprentices' P. Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 1427, 10 L.Ed.2d 638, supra): "It was recognized in that case [Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018] that restoration of union membership was a remedy that the Board could not accord and indeed that the *internal* affairs of unions were not in themselves a matter within the Board's competence. The Court then went on to hold that, in the presence of admitted state jurisdiction to order restoration of membership, the State was not without power 'to fill out this remedy' by an award of consequential damages, even though these damages might be for conduct that constituted an unfair labor practice under federal law."

In sum, the petition sufficiently alleges that the respondent union violated the petitioners' right to be considered for membership on the basis of fair standards, fairly applied. If, following interposition of an answer by the respondent and a hearing at Special Term, the petitioners' allegations are proven, they are entitled to an order requiring the respondent to admit them to membership and to such other additional relief as may be appropriate.[5]

Accordingly, I would reverse the order of the Appellate Division, reinstate Special Term's order denying the respondent's cross-motion to dismiss the petition and remit the matter to Special Term for further proceedings in accordance with the views I have expressed.

SCILEPPI, BERGAN, KEATING, BREITEL and JASEN, JJ., concur with BURKE, J.

FULD, C. J., concurs in a separate opinion in which BERGAN and JASEN, JJ., concur.

Order reversed, with costs, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

---

[5] Even though the petitioners may have requested relief to which they are not entitled, CPLR 3017 (subd. [a]) provides—as Judge Burke observed in his opinion (22 N.Y.2d p. 41, 290 N.Y.S.2d p. 887, 238 N.E.2d p. 299)—that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded". (See, also, 1 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.03, pp. 4-7, where it is said, "Under the new practice there is no 'procedural no-man's land'".)

LIBRARY
REME COURT. U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 612

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,

Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SOLOMON D. MONSHINE,
Attorney for Harold Phalen, Stephen Amador and Harry Ryan,
225 Broadway,
New York, N. Y. 10007.
CO 7-3085

INDEX

	PAGE
Statement of the Case	1
Summary of Argument	3
Question Presented	4
I. The Union has violated petitioners' rights by unjustifiably barring them from membership	4
II. Having shown injury to substantial rights, petitioners are entitled to due relief	12
III. The state courts are not rendered incompetent by the federal pre-emption doctrine	18
Conclusion	30

Cases Cited

Blende v. Maricopa County Medical Society, 96 Ariz. 240, 393 P. 2d 926 (1964)	11
Matter of Brenner v. O'Connell, 308 N. Y. 636, 127 N. E. 2d 715 (1955)	17
Matter of Brown v. McGinnis, 10 N. Y. 2d 531, 225 N. Y. S. 2d 497, 180 N. E. 2d 791 (1962)	16
Matter of Caruci v. Dulan, 41 Misc. 2d 859, 246 N. Y. S. 2d 727 (Sup. Ct. 1964), *rev'd on other grounds*, 24 A. D. 2d 529, 261 N. Y. S. 2d 677 (4th Dept. 1965)	17

PAGE

Matter of Council v. Donovan, 40 Misc. 2d 744, 244 N. Y. S. 2d 199 (Sup. Ct. 1963) 17

Matter of Diocese of Rochester v. Planning Board of Brighton, 1 N. Y. 2d 508, 154 N. Y. S. 2d 849, 136 N. E. 2d 827 (1956) 17

Falcone v. Middlesex County Medical Society, 34 N. J. 582, 170 A. 2d 791 (1961) 8, 9, 10

Firestone v. First District Dental Society, 24 A. D. 2d 268, 265 N. Y. S. 2d 525 (1st Dept. 1965) ... 9

Green v. Folks, 13 A. D. 2d 744, 215 N. Y. S. 2d 116 (1st Dept. 1961) 19

James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944) 10

Kronen v. Pacific Coast Society of Orthodontists, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965) 11

Kurk v. Medical Society of Queens, Inc., 46 Misc. 2d 790, 260 N. Y. S. 2d 520 (1965) *revd. on other grounds*, 24 A. D. 2d 897, 264 N. Y. S. 2d 859 (2d Dept. 1965) 9

Matter of Mandle v. Brown, 5 N. Y. 2d 51, 177 N. Y. S. 2d 482, 152 N. E. 2d 511 (1958) 17

Matter of Mancuso v. New York State Employees' Retirement System, 42 Misc. 2d 261, 247 N. Y. S. 2d 956 (Sup. Ct. 1964) 17

Matter of Nowak v. Wereszynski, 21 A. D. 2d 427, 250 N. Y. S. 2d 981 (4th Dept. 1964) 14

PAGE

Real v. Curran, 285 App. Div. 552, 138 N. Y. S. 2d 809 (1st Dept. 1955) 19

Salter v. New York State Psychological Association, 14 N. Y. 2d 100, 248 N. Y. S. 2d 867, 198 N. E. 2d 250 (1964) 9, 18

Simons v. Berry, 240 N. Y. 463, 148 N. E. 636 (1925) 10

Matter of Towers Man. Corp. v. Thatcher, 271 N. Y. 94, 2 N. E. 2d 273 (1936) 15

Trautwein v. Harbourt, 40 N. J. Super. 247, 123 A. 2d 30 (1956), certification denied 22 N. J. 220, 125 A. 2d 233 (1956) 8

Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903 (1967) 19, 20

Matter of Weidenfeld v. Keppler, 84 App. Div. 235, 82 N. Y. S. 634 (1st Dept. 1903) *aff'd* 176 N. Y. 562, 68 N. E. 1125 ..... 17, 18

Wilson v. Newspaper and Mail Deliverers' Union, 123 N. J. Eq. 347, 197 A. 720 (1938) 10

Statutes Cited

Civil Practice Law and Rules of the State of New York:

Section 103(b) 13

Section 103(c) 12

Section 3017 13

Section 3017(a) 13

PAGE

Section 7803, subd. (3) 16

Section 7806 ..... 13, 14

Labor Management Relations Act:

29 U. S. C. A. §158(b)(1) 19

Authorities Cited

Summers, "The Right to Join a Union," 47 Colum. L. Rev. 33, 43-44 (1947) 5

Weinstein, Korn & Miller, New York Civil Practice §401.03, pp. 4-7 18

Weinstein, Korn & Miller, 7803.06, p. 78-41 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,
Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Harold Phalen, Stephen Amador and Harry Ryan, petitioners in the court below, brought this suit in the form of an Article 78 proceeding for an order "directing respondent union to admit each of the petitioners to membership" in Theatrical Protective Union No. 1, International Alliance of Theatrical and Stage Employees, A.F.L.-C.-I.O. (hereinafter called "the Union" (R. 7-11).

The petition and supporting papers allege that the Union has sole jurisdiction in New York and Bronx Counties amounting to "monopolistic power" (R. 11) over the hiring of stage hands and stage maintenance employees in local theatres. The Union, however, restricts its membership (R. 11), not on the basis of reasonable or objective criteria, such as experience or ability (R. 20), but generally on the basis that the candidate has been proposed by his father or a relative (R. 14). The appren-

tice training route is not open to petitioners, who are over 35, even in the unlikely event of being proposed by a Union member (R. 14).

Each of the petitioners had worked for many years as a stage hand or stage maintenance man and, before suing, "had applied many time to respondent for membership but had been refused" without valid reasons, every time (R. 11). Injury resulted to their right to take part in union activities that vitally effect their livelihood.

The "prime reason" for the Union's membership restrictive practices is to "perpetuate the members economic status at the expense of the non-member," allowing members to "easily earn $15,000.00 per annum, whereas non-members . . . have difficulty earning $4,000 per annum from covered employers." (R. 14). When they fall below that figure, their pension rights are imperiled (R. 10-11).

The Union, as the exclusive bargaining agent for stage hands and stage maintenance employees in theatres in its area, negotiates work conditions and pay scales for non-members as well as members (R. 12). Although petitioners must pay 4 per cent of their gross weekly salary to the Union (R. 12), they are never consulted about rates of pay and working conditions (R. 13), and self evidentially are taxed without representation. Adding to the injustice, the non-members' assessments are used to provide funeral expenses and other benefits for members only (R. 24).

The Union has unreasonably and illegally denied petitioners a right to economic security and to earn a living (R. 20). Some of the ways in which the denial works are vividly pictured in the affidavits. Petitioner Phalen recounts his difficulties in finding and holding a stage hand's job with normal continuity, of competing on an equal basis with the members of the Union, and of getting enough work to earn a living (R. 13). Petitioner Ryan's affidavit

documents the continual interruptions in his employment over a six year period (R. 16-19). One lay-off led him to file an unfair labor practice complaint with the National Labor Relations Board. The dispute was settled shortly afterward, when the Union agreed to get him a stage hand's job if he withdrew the complaint (R. 23).

Summary of Argument

The Union has violated petitioners' rights by its unreasonably restrictive admission practices. Their injuries include wrongful exclusion from a part in making the Union's policies and choosing its officers; and denial of a vote on the amount of dues or assessments or a voice as to terms to be proposed or accepted in bargaining collectively with employers. Petitioners have been left out of some of the economic benefits enjoyed by members, and taxed and regulated without representation. They have been indirectly damaged in their right to earn a living and to have equal access on merit to jobs in their chosen trade.

Those results of the Union's persistent, unjustifiable exclusion of petitioners from membership amount to actionable wrongs.

The courts of New York are not powerless to give relief from these wrongs. They can assure that petitioners will be considered for membership on the basis of fair and lawful criteria. An order under Article 78 would afford the needed relief; but if for any reason such an order is not available, the courts are free to award whatever remedy is appropriate.

The state courts are not rendered incompetent in this case on a theory of federal pre-emption, for no paramount federal interests are involved in this challenge to the Union's membership admission practices.

Question Presented

Does the National Labor Relations Board have power to grant union membership to a non-member working within the jurisdiction of a local or does Section 154(b)(1) of 29 U. S. C. A. oust the National Labor Relations Board in that area of granting an order directing union membership but relegating the individual to state courts as only the state courts have jurisdiction over issues involving the internal workings of a union.

I

The Union has violated petitioners' rights by unjustifiably barring them from membership.

The main issue raised by the petition for a Writ of Certiorari is a fundamental one: Is it true that no New York court has any concern about who is admitted to or barred from membership in a union, or why—on the reasoning that no person has any legal right to join a union? Petitioners say it is not true. They rely on considerations of fairness, sound policy and justice, as well as a strong trend in the developing statutory and case law. The Union answers Yes and invokes analogy and old precedents.

The main argument from analogy runs, in effect, "No one could enlist the law to force his fellowship on the members of a golf club, a beach club, a lodge or a fraternity. No more can he do so to get into a union."

Underlying that argument is the unspoken but false assumption that the motive and effects involved in joining are similar in the two cases. Applicants for membership in a golf club have a yen for fun and fellowship. But men who want to become members of a union have their livelihood uppermost in mind. This difference became apparent nearly a generation ago:

> "It is one thing to exclude a person from participating in enjoyable social functions, but it is another thing to exclude him from participating in determining the rules which will govern his working hours and his economic well-being." Summers, "The Right to Join a Union," 47 Colum. L. Rev. 33, 43-44 (1947).

Exclusion from taking part in determining the rules under which they earn a living precisely describes the kind of injury petitioners have suffered. For such an injury judicial remedy exists and no musty learning can stand in the way of its recognition.

The dicta that long ago asserted that unions, as voluntary associations, have an absolute right to select their members without interference from any quarter, rested on social conditions long since outdated and theories now discarded. They were uttered before the dawn of the era in which the economic well-being of the workingman became intimately bound up with labor union activities. They depended on a view of what unions are, what role they play in the lives of workingmen in many lines of work, that is totally unreal today.

In those days the relationship created by joining a union was thought to be one of a highly personal nature. Recognizing the "futility of attempting to force one man's companionship on another," the courts were loath to order unions to admit applicants. Some decisions laid it down that the unions had as much power to exclude as a fraternal lodge—for any reason at all or no reason whatever. Those days have passed. For at least a generation it has been absurd to apply legal rules covering clubs, fraternities and other social groups to the problem of admission to labor unions.

As the record in this case shows, membership in the respondent Union is for these petitioners the key to an effective voice in labor relations and working conditions and to a chance for equal job opportunity. Non-members are not consulted in the collective bargaining process with regard to such matters as the work conditions or pay scales they seek (R. 13). They have no voice in determining the Union's officers or policies, although both will affect their livelihood. Ryan's affidavit shows a regular assessment of 4 per cent of gross earnings, payable to the union, in part to defray benefits for members only (R. 24). Their employment tends to be sporadic, irregular, constantly interrupted (R. 13, 16-19). In the Union's hiring hall they are at a disadvantage compared to members.

On the record here all those well-pleaded allegations by petitioners stand admitted.

Likewise beyond dispute is the Special Term's finding that the Union's "arbitrary refusal to admit petitioners into membership has either effectuated or threatens to effectuate, a divestment of their pension fund benefits . . ." (R. 33).

In the face of these demonstrations of injury to important interests, no modern court would hold that petitioners have failed to set forth a claim that substantial rights have been invaded.

The majority of the Appellate Division, in dismissing the petition, did not deny the substantive validity of petitioners' claims. Their decision went on a procedural point, namely that suit under Article 78 in the nature of mandamus is not an allowable remedy against a union "in the absence of a violation of a statutory duty" (43). We show in Point II, below, that this was a needlessly technical view of the procedural posture of the case.

The critical point here is not procedural but substantive. These petitioners have substantial rights in relation to the Union, and those rights were violated.

True, no non-member can point to a statute or decision that in terms gives him an absolute right to join this union or that. But every non-member can assert a right not to have his application rejected arbitrarily, unreasonably, or on unjust grounds.

Limits on unions' power to exclude applicants have appeared increasingly in both legislative and judicial pronouncements. In the Civil Rights Act of 1964 Congress put the stamp of national concern on the problem. Many years earlier the legislature of this State had given impetus to the movement by adopting Section 43 of the Civil Rights Law. Both statutes forbid unions to exclude individuals from membership on grounds of race, color, religion, sex or national origin. They establish that the so-called "free choice" and "voluntary association" dogmas of yesteryear have no application to contemporary unions. They recognize that unions hold too much power over economic opportunity for too many people to be left to follow whims and caprices under the mask of free choice.

The fact that the national and state legislatures have banned discrimination for specified reasons does not mean that unions have carte blanche to practice it for other reasons. The legislation does not license them to behave arbitrarily or unjustly in their admission practices as long as they avoid the enumerated prohibitions. Legislative action has not meant judicial paralysis. Far from excluding parallel judicial trends, the enactments have reinforced them.

A clear line of authority has emerged, distinguishing between social groups on the one hand and professional or vocational groups on the other. The Order of Eastern Stars may as a social group bar whichever ladies it will

for whatever reasons it will, but the same is not true of an organization that wields economic power over would-be members' lives. See *Trautwein* v. *Harbourt*, 40 N. J. Super. 247, 123 A. 2d 30 (1956), certification denied 22 N. J. 220, 125 A. 2d 233 (1956). A clear expression of the difference has appeared in cases testing whether a medical society may exclude a doctor on grounds that are unrelated to objective standards.

Older cases mechanically applied the dogma that a medical society is a voluntary association with absolute control over its own membership rolls. Recent authority holds that the group's virtual monopoly over the practice in a locality makes membership a practical necessity. Fairness in admission policies and practices will be enforced by courts with increasing readiness. The leading case is *Falcone* v. *Middlesex County Medical Society*, 34 N. J. 582, 170 A. 2d 791 (1961), where the doctrinal metamorphosis is carefully traced (34 N. J., at p. 596, 170 A. 2d, at p. 799):

> ". . . When courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were involved. The intimate personal relationship which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration. Here there have been persuasive indications . . . that in a case

> presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership. . . ."

Dr. Falcone was ordered admitted to membership in the Society. He had been kept out because, although he had attended a State-accredited medical school for a full course and satisfied the written by-laws' standards, and was a qualified physician, his main medical training was in a school not approved by the A.M.A. The Society's ethics committee imposed an unwritten requirement of A.M.A. approval and rejected Dr. Falcone. The Supreme Court of New Jersey declared that membership in the Society was "an economic necessity" and that (*id.*, at p. 592, 170 A. 2d, at p. 797):

> ". . . in dealing with such an organization, the court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization. . . ."

In 1964 the Court of Appeals of the State of New York carefully considered and strongly approved the *Falcone* decision as one in which the court had ordered the applicant admitted to membership "because he proved both monopoly and economic necessity." *Salter* v. *New York State Psychological Association*, 14 N. Y. 2d 100, 107, 248 N. Y. S. 2d 867, 872, 198 N. E. 2d 250, 253 (1964). However, Salter's situation was different, for he failed to satisfy the Association's objection requirement of post-graduate work. The Court of Appeals of the State of New York accordingly, declined to hold the Association's action improper. (See, also, *Firestone* v. *First District Dental Society*, 24 A. D. 2d 268, 265 N. Y. S. 2d 525 (1st Dept. 1965); *Kurk* v. *Medical Society of Queens, Inc.*, 46

Misc. 2d 790, 260 N. Y. S. 2d 520 (1965), *revd. on other grounds*, 24 A. D. 2d 897, 264 N. Y. S. 2d 859 (2d Dept. 1965).)

The *Falcone* doctrine applies with equal force to arbitrary exclusion practices by a labor union with monopolistic powers when economic injuries result, as they have to these petitioners. As long ago as 1925 this Court, in a labor union case, *Simons* v. *Berry*, 240 N. Y. 463, 465, 148 N. E. 636, 637 (1925), declared (per Judge Cardozo):

> ". . . Equity will enjoin the denial to a member of the privileges of membership where the denial, if continued, will work irreparable injury."

Simons had been a member of a local printing pressmen's union, the charter of which was revoked by the parent international union. He applied for membership in the international, but was rejected. The Appellate Division dismissed his complaint that asked for membership, an injunction and damages against the union, but the Court of Appeals for the State of New York reversed, making clear that union membership privileges are valuable rights, deserving of protection against illegal denial.

Outside New York, a parallel trail was marked by farsighted New Jersey and California decisions. In *Wilson* v. *Newspaper and Mail Deliverers' Union*, 123 N. J. Eq. 347, 350-351, 197 A. 720, 722 (1938), the court admonished the union that had refused Wilson's application for membership: "the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others."

The theme that a union's greater power imposes greater responsibility to play fairly with applicants was recognized in California in *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P. 2d 329, 335 (1944), the Supreme Court stating:

> " . . . Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal organizations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. . . . "

See, also, *Blende* v. *Maricopa County Medical Society,* 96 Ariz. 240, 393 P. 2d 926 (1964); *Kronen* v. *Pacific Coast Society of Orthodontists,* 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965).

To forbid a union to discriminate for race or religion, as the statutes do, or for other arbitrary and unreasonable considerations, as the courts increasingly do, does not leave the unions helpless to control admission. They remain entirely free to adopt fair criteria of admission and to administer them with equality and reasonable objectivity. Applying fair criteria, they could keep out individuals who are incompetent at their trade or occupation, who engage in spying or other activities calculated to injure the union, who have criminal records, or who are otherwise unfit.

No such grounds have been shown here or could be. The Union has made no effort to justify its refusal to admit petitioners to membership. It does not pretend that they are unqualified—morally, physically, mentally, or by reason of incompetence at their work. It does not try to relate their rejection to any objective criteria. It stands on an uncompromising assertion of a presumed right to bar them, whatever the injury to their economic well-being and regardless of its power over their occupations.

In pursuing that course, the Union has substantially injured the petitioners in respect to substantial legal interests. The question that remains is what kind of judicial redress is appropriate for their injury.

II

Having shown injury to substantial rights, petitioners are entitled to due relief.

Petitioners' basic right to be considered for membership in the Union by fair and reasonable criteria was not challenged by the court below. Its order of dismissal was dictated by its view that applicable procedural rules hold "an Article 78 proceeding for mandamus does not lie" in these circumstances.

If mandamus is not available, what about other types of relief? The possibility of awarding a different remedy seems not to have occurred to the Appellate Division majority.

Its order thus rested upon the mistaken view that the court was bound by old and narrow precedents that preclude mandamus-style relief; and upon the wrong impression that if the requested remedy is not available, the court has no alternative but to dismiss.

That may have been the law in centuries past, but petitioners before New York courts who today show an invasion of their legal interests become entitled to a remedy, even if the court thinks they have mistaken its form. Section 103(c) of the Civil Practice Law and Rules of the State of New York is clear and categorical that

> "a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form. . . ."

Instead of dismissing the suit, "the court shall make whatever order is required for its proper prosecution." This applies not only to traditional "actions" but also to special proceedings of the Article 78 type, as CPLR §103 (b) of the State of New York makes clear:

> ". . . procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings."

These provisions are a firm directive to the courts to bend their efforts to cure defects in matters of form. A court with jurisdiction over the parties may not resign in the face of a merely formal mistake. It must make whatever order is required for the proper prosecution of the case. There is no longer a "procedural no man's land." Weinstein, Korn & Miller, New York Civil Practice §401.03, pp. 4-7.

Perhaps in using the cryptic phrase "mandamus does not lie" the court was challenging more than the particular writ and was ruling that no Article 78 relief of any kind would lie. If so, its ruling is erroneous for failing to take account of CPLR §§3017 and 7806 of the State of New York. Those provisions make plain that the result of seeking an incorrect or unavailable remedy is a corrective order, not a dismissal.

Section 3017(a) of the CPLR of the State of New York provides in its relevant part that

> "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just."

Under that grant of authority the courts have general power to award whatever relief is called for by the case made, with conditions added as circumstances require, in the interests of justice.

To fortify that general authority in Article 78 proceedings, CPLR §7806 of the State of New York specifically provides that the judgment in a special proceeding "may grant the petitioner the relief to which he is entitled," regardless of his prayer.

When the Appellate Division, First Department, Supreme Court of the State of New York reached the conclusion that mandamus-style relief under Article 78 was not appropriate against the Union by reason of the absence of a "statutory duty," it was obliged to consider other relief—declaratory judgment, equitable injunction, or whatever remedy it might fashion to assure an efficacious result. (See *Matter of Nowak* v. *Wereszynski*, 21 A. D. 2d 427, 430, 250 N. Y. S. 2d 981, 983 (4th Dept. 1964).) Any remedy that does not depend on whether the duty breached is "statutory" might have qualified.

Petitioners' grievances should have been decided on their merits, not dismissed on a procedural nicety. To dismiss for assumed technical restrictions is contrary to both the letter and spirit of the CPLR of the State of New York.

But even if the court were in truth restricted to awarding mandamus or nothing, it should have decided for mandamus. Petitioners' rights were violated by the Union's continuing determination not to consider their applications on fair criteria. That action was "arbitrary and capricious" and an abuse of discretion. There being no contractual or other private legal relationship, a proceeding under Article 78 is the indicated remedy; and of the Article 78 remedies a directive order in the nature of mandamus is more suitable than a certiorari-style review, or an order of prohibition, which attacks jurisdiction.

The arguments in said Appellate Division were that the requested remedy is unavailable because there is "an ade-

quate remedy at law," because no "statutory duty" exists, and because the Union, as an unincorporated group, is immune from a mandatory order. Those arguments rest upon a dubious reading of the cases and a neglect of the plain language of Article 78.

Nowhere in the CPLR of the State of New York is Article 78 relief restricted or conditioned in any of those ways. Nothing in the CPLR of the State of New York makes Article 78 a second-class or a last-extreme remedy compared to other types of proceedings. There is no hint of an "adequate remedy at law" restriction on relief under the Article. If the New York State legislature had intended that these proceedings be available only when no other legal remedy is open, it would have found the words to say so, explicitly, as it did in Section 7801 of the State of New York in requiring finality and exhaustion of remedies as prerequisites to Article 78 review. Those requirements are obviously designed to prevent resort to the courts while administrative or other non-court channels of correction are still open. Those requirements have no applicability here, where there are no non-judicial stones unturned. Cf. *Matter of Towers Man. Corp.* v. *Thatcher*, 271 N. Y. 94, 98, 2 N. E. 2d 273, 274 (1936). The Union's repeated rejection of petitioners' application is "final." They have no further recourse. No unused opportunity for rehearing exists. There is no appellate path to obtain a review of the Union's actions.

While random expressions appear in some of the cases indicating that the absence of an adequate remedy at law is a condition to maintaining mandamus-type proceedings, the expressions obviously do not rewrite the 1963 statute.

These petitioners did all they were required to do by way of exhausting non-judicial remedies when they ap-

plied and reapplied to the Union for admission to membership and received unqualified rejections. Being properly before the court on substantial claims of right, they ought not be ejected on the ground that since they chose to enter by the wrong door, they must now depart, and return by a different one. Their petition asks for an order "directing respondent to admit" them, and they are not disposed to cavil about how the court accomplishes that result.

The absence of a "statutory duty" or a "duty specifically enjoined by law" once deterred many courts from ordering mandamus, but it is no longer crucial, now that other grounds have been added. Under the present provisions of Article 78 separate and sufficient grounds for mandatory relief are present if the challenged determination was "arbitrary and capricious" or "an abuse of discretion." CPLR §7803, subd. (3) of the State of New York. The leading commmentators in the field summarize as follows the impact of the new provisions (Weinstein, Korn & Miller, §7803.06, p. 78-41):

> "CPLR 7803 (3) now specifically provides that a claim of an 'abuse of discretion' or of 'arbitrary and capricious' action is reviewable under Article 78. The addition of this explicit language should serve to vindicate the substantial body of previous authority permitting review of the exercise of discretion and rejecting the inference that the 'duty enjoined by law' language [states the exclusive ground]."

Included in the previous authority were pre-1963 decisions by said Court of Appeals allowing mandamus-style proceedings to challenge actions as "arbitrary and capricious" or an "abuse of discretion." *Matter of Brown*

v. *McGinnis*, 10 N. Y. 2d 531, 225 N. Y. S. 2d 497, 180 N. E. 2d 791 (1962); *Matter of Mandle* v. *Brown*, 5 N. Y. 2d 51, 177 N. Y. S. 2d 482, 152 N. E. 2d 511 (1958); *Matter of Diocese of Rochester* v. *Planning Board of Brighton*, 1 N. Y. 2d 508, 154 N. Y. S. 2d 849, 136 N. E. 2d 827 (1956); *Matter of Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

Since 1963, mandamus has been utilized on those grounds in several cases decided in the lower courts. See, *e.g.*, *Matter of Mancuso* v. *New York State Employees' Retirement System*, 42 Misc. 2d 261, 247 N. Y. S. 2d 956 (Sup. Ct. 1964); *Matter of Caruci* v. *Dulan*, 41 Misc. 2d 859, 246 N. Y. S. 2d 727 (Sup. Ct. 1964), *rev'd on other grounds*, 24 A. D. 2d 529, 261 N. Y. S. 2d 677 (4th Dept. 1965); *Matter of Council* v. *Donovan*, 40 Misc. 2d 744, 244 N. Y. S. 2d 199 (Sup. Ct. 1963).

Whether or not the Union's rejection of petitioners' applications was a "determination," it was by any test arbitrary and capricious and an abuse of the discretion lodged in the Union by law. It is properly challenged by the proceeding filed.

The contention that mandamus will not lie against a voluntary association is ultimately based on *Matter of Weidenfeld* v. *Keppler*, 84 App. Div. 235, 82 N. Y. S. 634 (1st Dept. 1903), *aff'd* 176 N. Y. 562, 68 N. E. 1125. *Weidenfeld* is a thin reed to support so heavy a burden. The petitioner there brought mandamus against the president of the Stock Exchange to secure reinstatement to membership. In denying him relief, the Appellate Division thought the single question in the case was whether "mandamus is the proper remedy," and concluded it was not. The Court of Appeals for the State of New York affirmed without opinion.

The reasoning in the *Weidenfeld* case was that since the state had not chartered the Exchange, the latter derived no rights from it; hence, the question presented did not partake of a "public nature."

That reasoning has no applicability to a union exercising the kind of economic control over petitioners' livelihood that the record in this case describes. Whether or not *Weidenfeld* would today be upheld on its facts need not concern us. Times are different, the law has moved and the Union in 1967 is not the Stock Exchange of 1903.

This Court has recently recognized that an Article 78 proceeding is a proper means of obtaining judicial review of a denial of membership in a voluntary association. In *Salter* v. *New York State Psychological Association*, *supra*, 14 N. Y. 2d 100, 248 N. Y. S. 2d 867, 198 N. E. 2d 250 (1964), a mandamus-style petition was brought, was entertained in the lower courts without dissent, and was sanctioned by this Court. Dr. Salter was not able to meet the Association's reasonable requirements, but his case shows that the court below erred in its view that "mandamus does not lie" in a membership rejection proceeding.

III

The state courts are not rendered incompetent by the federal pre-emption doctrine.

New York courts are not ousted from competence over this suit on any theory of federal pre-emption. There is no great federal question here involving strikes, boycott, collective bargaining or other labor-management issues of national impact. No employer has been sued. Employment relations come into the picture only in the most tenuous and peripheral manner, if at all.

The relief sought defines the controversy as one within state court competence. Petitioners seek "an order . . . directing respondent to admit each of said petitioners to membership . . ." (R. 11).

This problem is not one the Congress has committed to the exclusive competence of the National Labor Relations Board. On the contrary, the Labor Management Relations Act, while investing the Board with jurisdiction over "unfair labor practices," deliberately preserves the union's control of membership by declaring (29 U. S. C. A. §158(b)(1)):

> ". . . *Provided*, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

In Judge Breitel's words, this "provision seems to make clear Congress' unconcern with internal rules governing membership in a union or their application, rightly or wrongly, to particular members." (See *Real* v. *Curran*, 285 App. Div. 552, 556, 138 N. Y. S. 2d 809, 813 (1st Dept. 1955); see, also, *Green* v. *Folks*, 13 A. D. 2d 744, 215 N. Y. S. 2d 116 (1st Dept. 1961). In those cases, both involving claims for wrongful expulsion from union membership, the court held it had jurisdiction. Admission to membership is equally within the New York courts' competence. In both the *Real* and *Green* cases, *supra*, the Court in both instances ignored the defense of the doctrine of pre-emption.

After the decision below was rendered, the Union States Supreme Court in *Vaca* v. *Sipes*, 386 U. S. 171, 87 S. Ct. 903 (1967), review and reiterated the bounds of the pre-emption doctrine in a way that puts the issue to rest

in favor of state court competence. Owens, a union member, sued officials of his Union in a state court claiming in part that they had breached their duty to represent him fairly in disputes with the employer by arbitrarily refusing to carry his grievance to arbitration. (Owens' claim was that his blood pressure was not too high for him to work in Swift & Company's plant, despite medical opinion to the contrary.)

On its motion to dismiss, the Union argued that Owens' suit was "arguably and basically" one for an unfair labor practice within the NLRB's exclusive jurisdiction. The Supreme Court rejected that contention after a careful analysis of the pre-exemption doctrine and its own decisions thereon. It concluded that (*id.*, 386 U. S. 171, at p. 179, 87 S. Ct., at p. 911):

> "This pre-emption doctrine . . . has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. . . ."

Exclusivity will not be presumed; to infer it requires justification. Only if allowance of state remedies will bring down adverse effects "upon the administration of national labor policies" is pre-emption warranted. There is to be no ouster of state courts with out a showing of "need" (*id.*, 386 U. S. 171, at pp. 180-181, 87 S. Ct., at p. 912):

> "A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation."

Even less is pre-emption applicable to the present issue of prescribing and applying fair criteria for admission to union membership.

The opinion of the Court of Appeals for the State of New York unanimously reversed the order of the Appellate Division and is reported in 290 N. Y. S. 2d 881 (22 N. Y. 2d 34).

The opinion of Judge Fuld, appears at 290 N. Y. S. 2d page 887 where he said the following in discussing the doctrine of pre-emption, acquisition or retention of membership, authority of the state to pass on the issue of membership and the right of unions to arbitrarily bar workers from membership at page 887:

I agree with Judge Burke for reversal but I cannot accept the assumption—which seems, in part, to underly his reasoning—that labor organizations "enjoy 'full freedom of association' " and are under no duty to open their membership "to persons whom they would rather not admit to their company", except in certain extraordinary, but undefined, circumstances (opinion, 22 N.Y. 2d p. 41, 290 N.Y.S. 2d p. 886, 238 N.E. 2d p. 299). Nor am I able to subscribe to the suggestion (opinion, pp. 39-40, 290 N.Y.S. 2d 885, 238 N.E. 2d 298) that an aggrieved individual will have adequate relief, in an action against the union for breach of its duty of fair representation, the court merely enjoins continuance of discriminatory conduct in the future and awards damages stemming from past discrimination. For these reasons, I am impelled to write a separate opinion.

It is my view that, if a labor organization arbitrarily refuses to admit to membership persons, otherwise fully qualified by experience and ability, they are entitled, in a case not covered by section 43 of the Civil Rights Law, to an order or injunction directing the union to admit them

to membership.[1] On a motion to dismiss a pleading, be it complaint or petition, we read the allegations most favorably to the pleader (see, e.g., Kober v. Kober, 16 N.Y. 2d 191, 193-194, 264 N.Y.S. 2d 364, 365-366, 211 N.E. 2d 817, 818; Condon v. Associated Hosp. Serv., 287 N.Y. 411, 414, 40 N.E. 2d 230, and, so read, the allegations in the challenged pleading are sufficient to make out a cause of action entitling the petitioners to such an order.

National labor policy has been built on the premise that a majority labor organization is the most effective vehicle for obtaining improvements in wages, hours and working conditions. Consequently, it has been said, that policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123). The importance of the union in the economic life of the employee today cannot be overemphasized and, accordingly, its authority to act as exclusive representative is subject to the concomitant obligation to represent all members of the bargaining unit "without hostility or discrimination toward any, to exercise its discretion without complete good faith and honesty, and to avoid arbitrary conduct." (Vaca

---

[1] The requirements of section 807 of the Labor Law have no application to a proceeding by an employee against a labor organization to admit him to membership. Section 807—derived from section 876-a of the Civil Practice Act (the little Norris-LaGuardia Act)—is simply designed to prevent the issuance of injunctions, principally on the application of employers, in labor disputes, a term so defined in subdivision 10 (par. [c]) of the statute as to clearly exclude controversies between a union and its members or potential members. (See e.g., Wolchok v. Kovenetsky, 274 App. Div. 282, 284, 83 N.Y.S.2d 431; Caliendo v. McFarland, 13 Misc. 2d 183, 175 N. Y. S.2d 869.)

v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842; Humphrey v. Moore, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L. Ed. 2d 370.) A union which breaches its statutory mandate to represent all employees fairly and without discrimination is subject to an action for damages and an injunction to prohibit the continuance of the discriminatory conduct. (See Steele v. L. & N. R. Co., 323 U.S. 192, 207, 65 S.Ct.226, 89L.Ed. 173; Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Syres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785.)

The Supreme Court in the *Steele* case (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), declared that the Railway Labor Act imposed on the union, a duty, "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith" (323 U.S., at p. 204, 65 S.Ct. at p. 233).[2] And, in ensuing years, the courts have applied the doctrine to cases involving racial, see, e.g., Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283), as well as nonracial (see, e.g., Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra; Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370,

[2] On the same day on which it decided *Steele* (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), the Supreme Court also interpreted the National Labor Relations Act to require fair representation, saying that a union, as the agent of all the employees, was "charged with the responsibility of representing their interests fairly and impartially." (Wallace Corp. v. Labor Bd., 323 U.S. 248, 255, 65 S.Ct. 238, 242, 89 L. Ed. 216; see, also, Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048; Cyres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 822, supra; Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370, supra.)

supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048), discrimination.

However, an action for breach of the duty of fair representation by one who has been discriminated against, although it may afford him an important remedy, is no substitute for democratic participation in the affairs of the union. Unless an individual is a member of the union, he can have no voice in the selection of its officers who are his representatives in the collective bargaining process. Nor can he, if a non-member of the union, express his approval or disapproval of the terms of the collective bargaining agreement, which most vitally affects every day of his working life, embodying as it does the wages and terms and conditions under which he is to work. Again, as a nonmember, an employee will have no say (within the union) as to questions pertaining to grievances arising under the collective bargaining agreement even though the interpretation and enforcement of the agreement may have a most serious impact upon him.

Furthermore, a union is free to take positions between sets of conflicting employees represented by it and is allowed a wide range of reasonableness in serving the unit it represents so long as it acts in good faith. (See Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 11 L.Ed.2d 370, supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, supra; Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra.) The line of demarcation between the reasonable exercise of discretion and arbitrary abuse of power is often shadowy, and membership in the union of all qualified workers will furnish at least minimum assurance that the statutory bargaining agent has acted in good faith and in a nonarbitrary manner. A union official might well think twice before dis-

criminating against a worker, or a class of workers, if those discriminated against might, as members of the union, prevent his re-election.

Labor organizations, given the power to act as exclusive bargaining agents, are quasi-public organizations and ancient dogma, which described them as voluntary associations with unfettered control over their membership rolls, must be revised in the light of the realities of present-day industrial life. Membership in a union is, today, a matter which critically affects a person's ability to earn a living. It follows, therefore, that a labor organization may not arbitrarily exclude an employee from membership and that any discriminatory exclusion from such membership must be condemned and stricken under state law (see Note, 59 Col.L.Rev. 190, 199-200).

These views are not in conflict with what the court said in Gaynor v. Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627. We there held that the courts will not, at least in the first instance, issue an injunction mandating a labor organization to admit to membership persons excluded because of race, creed, color or national origin. But that conclusion was dictated, in large part, by the fact that in that case the plaintiffs against whom racial discrimination was being practiced were given a full and adequate remedy by resort to the State Commission for Human Rights (Civil Rights Law, §43). In the case before us, however, no such relief is available to the petitioners and, consequently if there is to be redress, it must be by way of a judicial proceeding. The Legislature did not consider whether the arbitrary exclusion of an employee for any reason other than race, color, creed or national origin requires the specially flexible and sensitive procedures available to the Commission for Human Rights (Executive

Law, §297, subd. 2). But, certainly, designation of that commission to deal with racial and religious discrimination did not take from the courts the broad powers vested in them to grant to parties aggrieved by wrongful conduct such relief as the situation demands.

It is true that the petitioners, by applying to the National Labor Relations Board or by bringing a *Steele*-type action, could have obtained an injunction against the union, forbidding continuation of their discriminatory conduct, as well as damages suffered by them (National Labor Relations Act, §8, subd. [b], par. [2]; see, e. g., Steele v. L. & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra). But the National Labor Relations Board is powerless to order that they be admitted to membership (infra, p. 47), and an injunction which merely enjoined the union from continuing its wrongful conduct would be utterly inadequate and incomplete relief. Lawsuits and injunctions are no substitute for the processes of democracy. Nothing less than membership in the union can give the petitioners—assuming they prove their allegations—their rightful opportunity to participate, however, indirectly, in the making of decisions which affect them so materially. Nor will a court injunction against discriminatory conduct enable them, in seeking jobs, truthfully to represent to prospective employers that they are members of the union having jurisdiction over the work involved—a representation which, as a practical matter, may be an indispensable prerequisite to obtaining employment.

This does not, of course, mean that a union must open its doors to felons (see Sovern, Legal Restrains on Racial Discrimination in Employment, ch. 6, p. 152, n. 43), to persons not qualified to perform the work of the bargaining unit or to persons who for any reason have undertaken to

destroy the union.[3] It does mean, though, that the union must admit all workers to membership without discrimination and that if, in bad faith or arbitrarily, it rejects an applicant, it may be compelled by order of the court—or in the case of racial discrimination by direction of the Human Rights Commission—to admit him to membership.

On the question of Federal pre-emption, I would say but a few words. Although I agree with Judge BURKE that the present action is not federally pre-empted, I hesitate to place sole reliance, as he has, on Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra, in view of the very restricted meaning which had been given that decision by knowledgeable commentators. (See, e. g., Lewis, Fair Representation in Grievance Administration: Vaca v. Sipes, 1967 Supreme Court Review 81, 99.) My reason for concluding that there is no Federal pre-emption in this case is very simple: the National Labor Relations Board does not have the power to direct a labor union to admit a worker to membership.

Section 8(b) (1) (A), which makes it an unfair labor practice for a union to restrain or coerce employees in their right to engage or refrain from engaging in collective activities, adds the proviso "[t]hat this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". (See, e.g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184, 186, 87 S.Ct. 2001, 18 L.Ed.2d 1123, supra.) The Supreme Court, construing that

---

[3] In Tawas Tube Prods. (151 N.L.R.B. 46, 48), the board held that a union did not violate section 8(b) (1) (A) because of its expulsion of members who had filed a decertification petition since the proviso to section 8(b) (1) (A) "would necessarily allow a union to expel members who attack the very existence of the union as an institution."

proviso, held in International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018, that a state court was not precluded, by virtue of the pre-emption doctrine, from restoring to membership a union member who had been wrongfully ousted from the union and that the state had the power to award consequential damages even though those damages might be for conduct which constituted an unfair labor practice. (See, also, Local 100 of the United Assoc. of Journeymen & Apprentices Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 10 L.Ed.2d 638.) In the course of its opinion, the court declared that "to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act" (356 U.S. at p. 620, 78 S.Ct. at p. 925) [4].

---

[4] In 1963, five years after *Gonzales*, the court summarized its holding in that case in these words (Local 100 of the United Assoc. of Journeymen & Apprentices' P. Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 1427, 10 L.Ed.2d 638, supra): "It was recognized in that case [Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018] that restoration of union membership was a remedy that the Board could not accord and indeed that the *internal* affairs of unions were not in themselves a matter within the Board's competence. The Court then went on to hold that, in the presence of admitted state jurisdiction to order restoration of membership, the State was not without power 'to fill out this remedy' by an award of consequential damages, even though these damages might be for conduct that constituted an unfair labor practice under federal law."

Thus, it is indisputable that the National Labor Relations Board lacks the power to regulate admission of workers to union membership, and an order issued by a state court requiring a union to grant membership to a worker would not conflict with any board remedy. It is hardly necessary to add that there is no perceivable difference, in the present context, between *restoring* to membership an employee wrongfully ousted and *admitting* one who has been wrongfully excluded from such membership. The injustice suffered by the worker in either case is precisely the same.

In sum, the petition sufficiently alleges that the respondent union violated the petitioners' right to be considered for membership on the basis of fair standards, fairly applied. If, following interposition of an answer by the respondent and a hearing at Special Term, the petitioners' allegations are proven, they are entitled to an order requiring the respondent to admit them to membership and to such other additional relief as may be appropriate.[5]

---

[5] Even though the petitioners may have requested relief to which they are not entitled, CPLR 3017 (subd. [a]) provides—as Judge Burke observed in his opinion (22 N.Y.2d p. 41, 290 N.Y.S.2d p. 887, 238 N.E.2d p. 299)—that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded". (See, also, 1 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.03, pp. 4-7, where it is said, "Under the new practice there is no "procedural no-man's land' ".)

Conclusion

The Union has violated petitioners' right to be considered for membership in the Union on the basis of fair standards, fairly applied. Its arbitrary and unjustifiable rejection of their applications has injured these workingmen in substantial ways. They are entitled to judicial redress for their injuries.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SOLOMON D. MONSHINE,
Attorney for Harold Phalen, Stephen Amador and Harry Ryan.